(20,599.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 248.

EDWARD MURPHY, 2D, PLAINTIFF IN ERROR,

vs.

JOHN HOFMAN COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print
Caption	*a*	1
Case on appeal	1	1
Statement	1	1
Summons	4	1
Plaintiff's Exhibit 21—Affidavit in replevin	4	2
Requisition	8	4
Defendant Murphy's Exhibit No. 21 A—Sheriff's return	8	4
73—Endorsed on Exhibit 21 A, clerk's certificate	9	4
Plaintiff's Exhibit No. 21—Sheriff's second return	9	5
Complaint	10	5
Answer of defendant Murphy	13	7
Answer of defendant Century Mercantile Co.	17	9
Proceedings at trial	20	10
Appearances, &c.	20	10
Plaintiff's Exhibit 1—Lease of September 4, 1902	21	11
2—Agreement of September 4, 1902	23	12
3—Deed (not set out)	25	13
4—Order (not set out)	26	14
5—Agreement of February 27, 1903	26	14
6—Letter, Dodge to John Hofman Co., March 7, 1903	28	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 29, 1907.

	Original.	Print.
Plaintiff's Exhibit 7—Letter, John Hofman Co. to Dodge Dry Goods Co., March 10, 1903...	29	15
8—Letter, Dodge to John Hofman Co., March 11, 1903.....	31	16
9—Letter, Schwarzwaelder & Co. to Church-Dodge Co., M'ch 16, 1903. Letter, Dodge to John Hofman Co., March 19, 1903.....	33 34	17 18
10—Letter, John Hofman Co. to Church-Dodge Co., March 17, 1903.....	34	18
11—Letter, Dodge to John Hofman Co., March 16, 1903.....	35	19
12—Letter, John Hofman Co. to Church-Dodge Co., March 18, 1903.....	36	19
13—Letter, Schwarzwaelder to John Hofman Co., March 18, 1903	38	20
14—Letter, Dodge to John Hofman Co., March 19, 1903.....	39	21
15—Letter, Schwarzwaelder & Co. to John Hofman Co., April 10, 1903.	40	21
16—Letter, Dodge to John Hofman Co., April 20, 1903.....	42	22
Defendants' Exhibit 40—Letter, John Hofman Co. to Dodge Dry Goods Co., June 5, 1903...	44	23
Plaintiff's Exhibit 17—Letter, Dodge to John Hofman Co., June 16, 1903	45	23
18—Letter, Dodge to John Hofman Co., June 20, 1903.....	46	24
Testimony of Alexander B. King, Jr.....	48	25
Plaintiff's Exhibit 19—Letter, John Hofman Co. to Century Mercantile Co., October 2, 1903	49	26
Testimony of Edson E. Pierce.....	50	26
Plaintiff's Exhibit 20—Letter, John Hofman Co. to Murphy, August 20, 1903..	51	27
Defendants' Exhibit 41—Invoice.....	55	29
Testimony of Andrew Stone.....	58	31
Defendants' Exhibit 68—Order of October 13, 1904....	69	37
Plaintiff's Exhibit 22—Order of October 9, 1903.....	76	41
23—Order of December 1, 1903....	79	42
Defendants' Exhibits 11, 12, and 13—Affidavits (not set out)	81	44
Defendants' Exhibit 14—Notice of motion to set aside injunction.....	82	44
Defendants' Exhibits 17, 18, 19, 28, 29, 30, 32, 34, and 35 (not set out)	83	45
Plaintiff's Exhibit 24—Order allowing amended return.....	85	45
Testimony of J. Irving Baucus.....	87	47
Defendants' Exhibit 2—Order of August 18, 1903....	89	48
70—Statement of sheriff's fees...	99	54
Testimony of John T. Norton.....	104	56

	Original.	Print.
Defendants' Exhibit 50—Letter, Barhite to Dodge Dry Goods Co., June 24, 1903..	105	57
51—Letter, Barhite to Norton, July 14, 1903.....	106	58
52—Letter, Barhite to Norton, August 12, 1903.....	107	58
Plaintiff's Exhibit 26—Letter, J. E. Dodge to John Hofman Co., May 26, 1903.	112	61
Plaintiff rests.....	112	61
Motion to set aside replevin, &c.....	112	61
Motion for judgment for defendant Murphy.....	113	61
Motion for judgment for defendant Century Mercantile Co.	114	62
Motions for nonsuit	115	62
Testimony of James E. Dodge.....	116	63
Defendants' Exhibit 54—Letter, Wm. Schwarzwaelder & Co. to Church-Dodge Co., January 16, 1903	117	63
Defendants' Exhibit 39—Letter, John Hofman Co. to Church-Dodge Co., March 4, 1903.....	123	67
Defendants' Exhibit 42—Letter, Dodge to John Hofman Co., May 25, 1903.....	124	67
Defendants' Exhibit 43—Telegram, John Hofman Co. to Dodge Dry Goods Co., May 21, 1903.....	124	68
Defendants' Exhibit 44—Letter, John Hofman Co. to Dodge Dry Goods Co., May 25, 1903.....	125	68
Defendants' Exhibit 45—Telegram, John Hofman Co. to Dodge Dry Goods Co., May 28, 1903.....	125	68
Defendants' Exhibit 49—Letter, John Hofman Co. to Church-Dodge Co., March 17, 1903.....	126	69
Defendants' Exhibit 58—Letter, John Hofman Co. to Dodge Dry Goods Co., June 18, 1903.....	127	69
Testimony of John A. Barhite.....	128	70
Testimony of James E. Dodge (recalled).....	129	70
Defendants' Exhibit 55—Letter, John Hofman Co. to Dodge Dry Goods Co., May 11, 1903.....	131	71
Testimony of Edward Murphy, 2d.....	146	81
Offers of exhibits, &c.....	158	87
Defendants' Exhibit 74—Certificate of clerk, May 26, 1904.	168	92
Further offers by defendants.....	169	93
Motions to strike out evidence, &c.....	171	94
Defendants rest.....	173	95
Proofs closed	173	95
Motion for verdict for defendant Murphy.....	174	95
Motion for nonsuit	177	97
Motion for verdict for plaintiff.....	178	97
Charge to jury.....	178	97
Plaintiff's requests to charge, &c.....	185	101
Exceptions to charge, &c.	190	103
Defendants' requests to charge.....	191	104
Verdict, &c.....	195	106
Order denying new trial.....	196	107
Judgment, June 15, 1905.....	197	107
Notice of appeal of Murphy to appellate division.....	198	108

	Original.	Print.
Notice of appeal of Century Mercantile Co. to appellate division	199	108
Affidavit of no opinion	199	108
Judge's certificate to case on appeal	200	109
Minutes of trial	201	109
Stipulation as to judgment-roll, &c.	203	110
Order for judgment in appellate division	203	111
Judgment in appellate division, January 19, 1906	204	111
Affidavit of no opinion	205	112
Notice of appeal of Murphy to court of appeals	206	112
Notice of appeal of Century Mercantile Co. to court of appeals	207	113
Stipulation as to record on appeal to court of appeals	208	113
Index to record on appeal	209	113
Remittitur from court of appeals	216	118
Certificate of no opinion in court of appeals	220	119
Assignment of errors	221	119
Petition for writ of error	231	125
Order allowing writ of error	241	130
Order allowing writ of error	243	131
Supersedeas bond on writ of error	245	131
Cost bond on writ of error	249	135
Writ of error	254	138
Affidavits of service of writ of error papers	257	139
Citation	259	141
Clerk's certificate	261	141

a In the Court of Appeals of the State of New York.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and Another, Appellants.

Case on Appeal.

John A. Barhite, Attorney for Respondent, German Insurance Co. Building, Rochester, N. Y.
H. D. Bailey, Attorney for Appellant Murphy, Nos. 1 and 2 Keenan Building, Troy, N. Y.
John T. Norton, Attorney for Appellant Century Mercantile Company, No. 249 River Street, Troy, N. Y.

1 to 3 In the Supreme Court of the State of New York, Appellate Division, Fourth Department.

Supreme Court, Appellate Division, Fourth Department.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Appellants.

Statement.

Action in replevin and for damages.
Summons served October 6, 1903.
Complaint served October 17, 1904.
Answers served October 28, 1904.
Trial had at Monroe Term, May, 1905, before Justice Dunwell and jury.
Verdict for possession of the property directed for plaintiff.
Order denying motion for new trial entered June 7, 1905.
Judgment entered June 15, 1905.
Notice of appeal served July 13, 1905.
No change of parties.

4 Supreme Court, County of Monroe.

JOHN HOFMAN CO., Plaintiff,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within

twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Monroe.

Dated this 3d day of October, 1903.

JOHN A. BARHITE,
Plaintiff's Attorney.

Office and post-office address, 84-86 German Insurance Co. Bldg., Rochester, N. Y.

(PLAINTIFF'S EX. 21.)

(*Affidavit in Replevin.*)

(Title.)

COUNTY OF MONROE, *City of Rochester*, ss:

John Hofman, being duly sworn, says that the John Hofman Co., the plaintiff in the above-entitled action is a domestic corporation, and has its principal office and place of business in the city of Rochester, New York, and that deponent is the president of said company.

Deponent further says that plaintiff is the owner of the following described chattels, viz.:

About 314 feet of quartered oak and plate glass show cases, as follows:

40 ft. for laces, 1′ 11″ x 3′ 4″, with one round corner and one angle corner. Plate glass top and front, German mirror back, metal standards and glass shelves.

26 ft. Glove counter and show case, 1′ 6″ x 2′ 9″. Top case mirror back, no shelves, glass bottom. Lower case with metal standards and glass shelves and mirror backs.

45 ft. Ribbon case, 1′ 11″ x 3′ 4″, with metal standards and metal rods for ribbon, one round and one angle corner.

38 ft. Jewelry show cases, 1′ 11″ x 3′ 4″ wide, metal standards and glass shelves, two angle corners.

29 ft. Silk show cases, 2′ 3″ x 2′ 9″, metal standards, one glass shelf, one round corner.

39 ft. Gents' furnishing goods cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves.

38 ft. Underwear cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves, two angle corners.

59 ft. Hosiery cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves, no angle corners.

Also three (3) cases around post, which are the chattels to be replevied in this action.

That said chattels are wrongfully detained by said defendants, and that the alleged cause of the detention thereof, according to the best knowledge, information and belief of deponent, is that the de-

fendant the Century Mercantile Company claims to own said chattels
under and pursuant to a lease and agreement made on or
6 about the fourth day of September, 1902, between James E.
Dodge and the Church-Dodge Company, a domestic corporation, which lease and agreement provided among other things that all improvements, fixtures, counters, shelving, show cases, cash system, soda fountain, machinery, appliances, partitions, railings, store fixtures and furniture of every kind and description which the said Church-Dodge Company shall erect, place or have in the premises described in said lease and agreement should become the property of said James E. Dodge, his representatives, executors, administrators or assigns upon the termination of said lease or in case at any time before the expiration of said lease the said Church-Dodge Company should be or become insolvent or should make a general assignment or should be adjudged a bankrupt in the Bankruptcy Act of the United States, or should pass into the hands of a receiver appointed by any court of competent jurisdiction in any legal proceedings by or against said Church-Dodge Company.

That thereafter said Century Mercantile Company became the owner of said premises and a domestic corporation known as the Dodge Dry Goods Company became the owner of the property of said Church-Dodge Company, and that said plaintiff delivered to said Dodge Dry Goods Company the chattels hereinbefore described, and said chattels were placed in and upon the premises described in said lease, and that by reason of the transfer to it of said premises, and by reason of said lease and agreement, said defendant the Century Mercantile Company claims said chattels, and that the defendant, Edward Murphy, 2d, claims said chattels by reason of the fact
that he is in possession of said premises where said chattels are
7 under and pursuant to a lease made to him by the defendant
the Century Mercantile Company.

That said chattels have not been taken by virtue of a warrant against said defendant for the collection of a tax, assessment or fine issued in pursuance of the statute of the State of New York or of the United States.

That said chattels have not been seized by virtue of an execution or warrant of attachment against the property of the said plaintiff or of any person from or through whom the plaintiff has derived title to the said chattels since the seizure thereof.

That the actual aggregate value of all of said chattels is the sum of four thousand dollars ($4,000.00).

That a demand upon said defendants for the return and possession of said chattels has been made by this plaintiff, but that said defendants have refused and neglected to surrender possession of the same to plaintiff. That plaintiff requires such chattels to be replevied pursuant to the provisions of the Code of Civil Procedure.

JOHN HOFMAN.

Sworn to before me this 5th day of October, 1905.

RUTH L. GEORGE,
Commissioner of Deeds.

8 *Requisition.*

To the sheriff of the county of Rensselaer:

You are hereby required to replevy the chattels described in the foregoing affidavit.

Yours, etc.,

JOHN A. BARHITE,
Plaintiff's Attorney.

84-86 German Insurance Co. Bldg., Rochester, N. Y.

(Sheriff's first return annexed to requisition filed November 5, 1904.)

DEFENDANT MURPHY'S EXHIBIT No. 21 A.

I certify and return that on the 6th day of October, 1904, at Troy, N. Y., I served upon the Century Mercantile Company and upon Edward Murphy, 2d, the defendants within named, a copy of the summons in the within entitled action, together with a copy of the undertaking given by the plaintiff, approved by me, and a copy of the within affidavit and requisition.

That by virtue of said affidavit and requisition, I did at the same time take from said defendants the property therein described.

That no notice of exception to the sufficiency of the sureties to the said undertaking was given to me by said defendants or either of them within the time prescribed by law; and no person made claim to said property taken by me as aforesaid, within the time prescribed by law; and, therefore, I delivered the same to said plaintiff; and I delivered to said defendants the original undertaking on
9 the part of the plaintiff herein mentioned.

Dated November 3, 1904.

MATTHEW A. HEERAN,
Late Sheriff of Rensselaer County,
By ANDREW STONE, *His Deputy.*

DEFENDANT MURPHY'S EXHIBIT 73, ENDORSED ON EXHIBIT 21 A.

STATE OF NEW YORK,
Monroe County Clerk's Office, ss:

I, James L. Hotchkiss, clerk of the county of Monroe, do hereby certify that I have made careful search in my office for any return by the sheriff of the county of Rensselaer in the action, brought by John Hofman Company against Edward Murphy, 2d, and the Century Mercantile Company, venue laid in the county of Monroe, since November 5, 1904, and I further certify, that upon such search I find no amended or further return in said action, and no return whatsoever other than the return filed November 5, 1904, in my office, of which the within is a copy.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county this 29th day of May, 1905.

JAMES L. HOTCHKISS, *Clerk.*

PLAINTIFF'S EXHIBIT No. 21.

(*Sheriff's Second Return.*)

I certify and return that on the 6th day of October, 1903,
10 at Troy, N. Y., I served upon the Century Mercantile Company and upon Edward Murphy, 2d, the defendants within named, a copy of the summons in the within entitled action, together with a copy of the undertaking given by the plaintiff, approved by me, and a copy of the within affidavit and requisition.

That by virtue of said affidavit and requisition, I did at the same time take from said defendants the property therein described.

That no notice of exception to the sufficiency of the sureties to the said undertaking was given to me by said defendants or either of them within the time prescribed by law; and no person made claim to said property taken by me as aforesaid, with the time prescribed by law; and, therefore, I delivered the same to said plaintiff, and I delivered to said defendants the original undertaking on the part of the plaintiff herein mentioned.

Dated November 3, 1904.

MATTHEW A. HEERAN,
Late Sheriff of Rensselaer County,
By ANDREW STONE, *His Deputy.*

Complaint.

[Title.]

The plaintiff, for a complaint against the defendants herein, alleges as follows:

That plaintiff now is, and was at all times hereinafter named, a domestic corporation with its principal place of business in the city of Rochester, New York.

11 That as plaintiff is informed and verily believes to be true, the defendant, the Century Mercantile Company, is a domestic corporation.

That at the time of the commencement of this action plaintiff was the owner and was entitled to the immediate possession of the chattels described as follows:

About 314 feet of quartered oak and plate glass show cases as follows:

40 ft. for laces, 1′ 11″ x 3′ 4″, with one round corner and one angle corner. Plate glass top and front, German mirror back, metal standards and glass shelves.

26 ft. Glove counter and show case, 1′ 6″ x 2′ 9″. Top case

mirror back, no shelves, glass bottom. Lower case with metal standards and glass shelves and mirror backs.

45 ft. Ribbon case, 1′ 11″ x 3′ 4″, with metal standards and metal rods for ribbon, one round and one angle corner.

38 ft. Jewelry show cases, 1′ 11″ x 3′ 4″ wide, metal standards and glass shelves, two angle corners.

29 ft. Silk show cases, 2′ 3″ x 2′ 9″, metal standards, one glass shelf, one round corner.

39 ft. Gents' furnishing goods cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves.

38 ft. Underwear cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves, two angle corners.

59 ft. Hosiery cases, 1′ 11″ x 3′ 4″, with metal standards and two glass shelves, no angle corners.

Also three (3) cases around post.

That said chattels were of the value of four thousand dollars ($4,000).

That, as plaintiff is informed and verily believes to be true,
12 before the commencement of this action the defendants wrongfully took the said chattels into their possession and wrongfully detains the same from the plaintiff.

That as plaintiff is informed and verily believes to be true, before the commencement of this action a demand was made upon the said defendants for the possession of said chattels on behalf of the plaintiff, but that defendants refused to deliver the same.

That plaintiff has been damaged in the sum of one thousand dollars ($1,000) by the detention of said chattels by the defendants.

Wherefore, the plaintiff demands that the defendants may be adjudged to deliver to the plaintiff the said chattels and to pay the plaintiff damages for the detention thereof in the sum of one thousand dollars ($1,000), and that in case a delivery thereof cannot be had, that the plaintiff may recover the value of said chattels with damages, as aforesaid, and in case the defendants shall retain the said property during the pendency of this action, that plaintiff may recover such further damages for the wrongful detention thereof as may be just, besides the costs of this action.

JOHN A. BARHITE,
Attorney for Plaintiff.

84-86 German Insurance Co. Bldg., Rochester, N. Y.

COUNTY OF MONROE, *City of Rochester, ss:*

John Hofman, being duly sworn, says:

I am the president of the plaintiff herein and an officer thereof; I know the contents of the foregoing complaint, and the same is
13 true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe to be true.

JOHN HOFMAN.

Sworn to before me this 17th day of October, 1904.

LUCY J. GREENLEAF,
Commissioner of Deeds.

Answer of Defendant Murphy.

[Title.]

For his separate answer to the complaint herein, the defendant, Edward Murphy, 2d, upon information and belief, denies every allegation therein contained, except the allegation that the plaintiff is a domestic corporation, except the allegation that the defendant the Century Mercantile Company is a domestic corporation, and except the allegation that the chattels mentioned in the complaint are of the value of $4,000.

I.

This defendant further answering said complaint, and for a separate defense thereto, upon his information and belief, avers, that upon a petition theretofore duly filed in the proceeding to have Dodge Dry Goods Company adjudged a bankrupt an order was duly made in the District Court of the United States, in and for the Northern District of New York, on August 18, 1903, whereby one Edward Murphy, 2d, was duly appointed receiver of said Dodge Dry Goods Company and of its property, and whereby all persons were enjoined and restrained from prosecuting any suits in any court against any of its property; that the receiver named
14 in said order gave the bond therein required and duly qualified, as such receiver, and entered upon the discharge of his duties, as such receiver, in the month of August, 1903; that at the time said order was so made the chattels mentioned in the complaint were the property of Dodge Dry Goods Company and were in use by it and in its lawful possession; that said chattels were, among other properties, in the possession of said Dodge Dry Goods Company surrendered and delivered to said receiver in August of 1903; that this action was commenced by the service of a summons on October 6, 1903; that at the time this action was commenced said chattels were in the possession of such receiver; that thereafter, pursuant to orders duly made in the bankruptcy proceedings against Dodge Dry Goods Company, in the United States District Court for the Northern District of New York, said chattels were, by the duly appointed officers of said court, duly sold and delivered to one William E. Murphy on or about October 10, 1904, from whose possession said chattels were taken pursuant to a requisition in replevin in this action at the instigation of the plaintiff on or about October 14, 1904. That at the time of the institution of said bankruptcy proceedings, in August of 1903, said chattels were the property of Dodge Dry Goods Company and continued to be its property, and the property of the receiver and trustee thereafter appointed in the said United States

court, until the sale thereof to William E. Murphy, as aforesaid, whereupon he became the owner of said chattels.

II.

This defendant further answering, and as a second separate defense to the said complaint, upon information and belief,
15 avers that on and prior to August 17, 1903, Dodge Dry Goods Company was the owner and in the actual and lawful possession of said chattels, using them at its store in Troy, N. Y. That on August 17, 1903, a petition was duly filed in the office of the clerk of the District Court of the United States for the Northern District of New York, whereby involuntary bankruptcy proceedings were duly instituted against said Dodge Dry Goods Company. That in said proceedings, by an order duly made in said United States Court on August 18, 1903, Edward Murphy, 2d, was duly appointed as receiver of said Dodge Dry Goods Company and of its property. That he duly qualified as such receiver, and was duly authorized to continue and did continue as such receiver until the due appointment of a trustee in bankruptcy of said Dodge Dry Goods Company. That after such qualification said receiver duly demanded of said Dodge Dry Goods Company all its property; that pursuant to such demand property was duly delivered to him, as such receiver, in August, 1903, and, among other things, the chattels mentioned in the complaint were so delivered, which chattels thereupon came and were in the exclusive custody and jurisdiction of said District Court of the United States. That such receiver, as such, retained and continued in the actual possession of said chattels, until the appointment of a trustee. That in said bankruptcy proceedings such proceedings were duly had; that in said United States Court, on or about October 14, 1903, said Dodge Dry Goods Company was duly adjudged a bankrupt, and thereafter in said court Edward Murphy, 2d, was duly appointed trustee in bankruptcy of said bankrupt, and duly qualified as such trustee on or about November 28, 1903. That thereafter, pursuant to the due order of said District Court,
16 such receiver duly delivered to such trustee the property of said bankrupt, including in that so delivered the chattels mentioned in the complaint; that thereafter and while said chattels were in the actual possession of said trustee, as such, said District Court duly ordered a sale thereof, and, pursuant to such order said chattels were duly sold at public auction, and such sale duly confirmed by said District Court.

That said bankrupt duly made and filed a schedule of its creditors; that upon that schedule appears the name of the plaintiff in this action, as a creditor, in the sum of about $4,000; that this plaintiff had due notice of the proceedings in said bankruptcy proceedings in said District Court.

That by reason of the facts aforesaid this court is without jurisdiction over the subject matter of this action, and the plaintiff is barred from maintaining this action.

Wherefore, This defendant demands judgment herein, dismissing the plaintiffs' complaint with costs, and adjudging the return of said

chattels so taken by the plaintiff to the defendants, and, in default of such return, for the value thereof.

H. D. BAILEY,
Attorney for Defendant Murphy,
Nos. 1 and 2, Keenan Building, Troy, N. Y.

STATE OF NEW YORK, *Rensselaer County, ss:*

Edward Murphy, 2d, being duly sworn, says that he is one of the defendants in the above-entitled action; that the foregoing answer therein is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that
17 as to those matters he believes it to be true.

EDWARD MURPHY, 2D.

Sworn to before me, October 26, 1904.
MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

Answer of Defendant Century Mercantile Company.

[Title.]

For its separate answer to the complaint herein the defendant the Century Mercantile Company, upon information and belief, denies that at the time of the commencement of this action, plaintiff was the owner and entitled to the immediate possession of the chattels mentioned in the complaint; denies that before the commencement of this action this defendant wrongfully took said chattels into its possession; denies that before the commencement of this action this defendant wrongfully detained said chattels from the plaintiff; denies the allegation that before the commencement of this action a demand was made upon this defendant for the possession of said chattels on behalf of the plaintiff; denies that this defendant ever refused to deliver said chattels; denies that the plaintiff has been damaged in the sum of $1,000, as alleged in the complaint; denies that plaintiff has been damaged in any sum whatsoever.

18 I.

This defendant further answering said complaint and for a separate defense thereto, upon its information and belief, avers that at the time this action was commenced, which was on October 6, 1903, Dodge Dry Goods Company, a domestic corporation, was the owner of said chattels. That Edward Murphy, 2d, as receiver in bankruptcy of said Dodge Dry Goods Company, theretofore duly appointed and qualified, was on October 6, 1903, in possession of said chattels and as such receiver entitled to the possession thereof. That said receiver had been and continued in the undisputed possession of said chattels from on or about August 20, 1903, to about December 1, 1903, when such receiver duly surrendered and delivered said chattels and the possession thereof to the trustee in bankruptcy of

said Dodge Dry Goods Company, theretofore duly appointed and qualified. That such trustee thereafter duly sold and delivered said chattels to one William E. Murphy on or about October 10, 1904, that said William E. Murphy thereafter continued in the lawful and peaceable ownership and possession of said chattels until October 14, 1904, on which date said chattels were unlawfully and wrongfully taken from his possession at the instigation and upon the direction of the plaintiff. That on October 6, 1903, and at all times prior thereto and subsequent to August 20, 1903, said chattels were in the custody of the law, in that they were in the possession and custody of the United States District Court for the Northern District of New York, being in the possession of its duly appointed and qualified receiver, as aforesaid. That with the exception of the three
19 post cases mentioned in the complaint, whose value is $150 the plaintiff made said chattels for Wm. Schwarzwaelder & Co., under a contract with them therefor and under such contract delivered said chattels, saving said three post cases, to said Schwarzwaelder & Co. in May or June of 1903, from whom they were purchased by said Dodge Dry Goods Co. That upon such delivery, pursuant to said contract, said Schwarzwaelder & Co. became indebted to the plaintiff for said chattels in the sum of $3,850.

Wherefore, This defendant demands judgment herein, dismissing the plaintiff's complaint with costs, and adjudging the return of said chattels so taken by the plaintiff to the defendants, and in default of such return, for the value thereof.

JOHN T. NORTON,
Attorney for Century Mercantile Company.

Office and post-office address, Dodge Bldg., Troy, N. Y.

STATE OF NEW YORK, *Rensselaer County, ss:*

W. J. Harper, being duly sworn, says that he is vice-president of the defendant in the above entitled action; that the foregoing answer therein is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WM. J. HARPER.

Sworn to before me, October 20, 1904.
MICHAEL F. O'CONNOR,
Notary Public, Rensselaer County, N. Y.

20 This action was brought to trial May 29, 1905, at the Trial Term in Monroe county, before Mr. Justice Dunwell and a jury.

Appearances.

For plaintiff, John A. Barhite.
For defendant, Murphy, H. D. Bailey.
D. M. Beach, as counsel.

For defendant, Century Mercantile Company, John T. Norton.

The trial was completed June first, and thereat the following proceedings were had:

Mr. Barhite opened for plaintiff.

Mr. BAILEY: I ask that the plaintiff be required to elect whether it will proceed against the defendant, Murphy, for the wrongful taking, or for the wrongful detention of the goods. Both are charged in the complaint. I think he should be called upon to elect on which theory he will proceed with this action.

Motion denied. Exception.

Mr. BARHITE: I offer in evidence lease, made on the 4th day of September, 1902, by and between James E. Dodge, of the city of Troy, and State of New York, of the first part, and the Church-Dodge Co. domestics corporation of the second part.

Mr. BAILEY: I object, on behalf of the defendant, Murphy, to it as incompetent and irrelevant, and not within any issue of this action.

Received. Exception.

Mr. NORTON: I object, on behalf of the Century Mercantile Co., to it as incompetent.

Received. Exception. Marked Exhibit 1.

21 This was a lease made September 4, 1902, by James E. Dodge to the Church-Dodge Company of the premises later occupied by that company as a store in Troy. Contained the usual provisions. Reads in part as follows:

"This agreement of lease, made and entered into this fourth "day of September, 1902, by and between James E. Dodge of the "city of Troy, county of Rensselaer, and State of New York, party "of the first part, and the Church-Dodge Company, a domestic cor- "poration organized under the laws of the State of New York, of "the same place, party of the second part, Witnesseth: The said "party of the first part, in consideration of the rents, covenants "and agreements hereinafter contained, has demised and leased and "does hereby demise and lease unto the said party of the second part, "the basement, main floor, mezzanine, second and third floors of "the building to be erected on the land of the said party of the "first part on the southwest corner of Third and State streets in "the City of Troy, N. Y., excepting and reserving therefrom the "office entrance ways, including halls, stairways and elevator shafts, "where the same shall be located to furnish access to the fourth and "fifth floors of said building, for the term to begin when the said "building shall be completed and ready for occupancy by the said "party of the second part, and to end on the first day of May, 1913, "at eight o'clock A. M. at and for the yearly rental of fifteen thou- "sand dollars ($15,000) for the period from the beginning of said "tenancy until the first day of May, 1908, payable in equal monthly "installments of twelve hundred and fifty dollars ($1,250) at the

"end of each and every month during said period from the

22 "begin-ing of the tenancy hereby created until the said first "day of May, 1908, and at and for the yearly rent of seven- "teen thousand five hundred dollars ($17,500) for the period be- "ginning on the first day of May, 1908, and ending on the first "day of May 1913, payable in equal monthly installments of four-

" teen hundred and fifty-eight and one-third dollars ($1,458\frac{1}{3}$) at " the end of each and every month during the said period of five " years.

" And the said party of the second part further covenants and " agrees that it will not take down or remove any fixtures, shelving, " boilers, engines or any machinery or fixtures in the demised prem- " ises without first obtaining the permission in writing of the said " party of the first part, and that it will not assign this lease or sub- " let or underlet the said demised premises or any part thereof " without first obtaining the consent in writing of the said party of " the first part.

" It is mutually understood and agreed that this instrument shall " bind the heirs, representatives and assigns of the party of the first " part and the successors and assigns of the party of the second part.

"(Signed) "JAMES E. DODGE.
"CHURCH-DODGE COMPANY,
"By WALTER M. CRANDALL, *Sec'y.*"

Mr. BARHITE: I offer in evidence supplemental agreement, dated September 8, 1902, executed by the Church-Dodge Co., which refers to the lease which has just been received in evidence and is made a part of it.

Mr. BAILEY: On behalf of the defendant, Murphy, I object to it as incompetent, immaterial, irrelevant, not within any issue
23 and certainly immaterial unless counsel accompanies this offer with a concession that the chattels mentioned in the complaint are included among those referred to in this supplemental agreement.

The COURT: I understood from his opening that they are the same goods.

Received. Exception.

Mr. NORTON: I object to it as incompetent and inadmissible against the Century Mercantile Co.

Received. Exception. Marked Exhibit 2.

(This agreement is as follows:)

" Whereas, Under date of the fourth day of September, 1902, " James E. Dodge made to the Church-Dodge Company, a domestic " corporation, located in the city of Troy, New York, a certain in- " denture of lease, of which it is the intention of the parties hereto " that this instrument shall constitute and be a part.

" Now, therefore, in consideration of the premises and of one " dollar, the receipt whereof is hereby acknowledged, the said " Church-Dodge Company has covenanted and agreed and does " hereby covenant and agree to and with the said James E. Dodge, " his heirs, representatives, executors, administrato-s and assigns as " follows, to wit: That all improvements, fixtures, counters, shelving, " showcases, cash system, soda fountain, machinery, appliances, par- " titions, railings, store fixtures and furniture of every kind and de- " scription which the said Church-Dodge Company shall erect, place " or have in the said demised premises in the equipment thereof for " the conduct of the dry goods and department store business, shall

"be and remain upon the said demised premises at the ex-
24 "piration or earlier determination of said lease and shall be
"surrendered to the said James E. Dodge, his heirs, repre-
"sentatives, executors, administrators or assigns free and clear of all
"leans, claims and incumbrances whatsoever and shall thereupon be-
"come and be the property of said James E. Dodge, his representa-
"tives, executors, administrators or assigns free and discharged of all
"and every right, claim or title whatsoever thereto of the said
"Church-Dodge Company.

"And the said Church-Dodge Company does further covenant and
"agree to and with the said James E. Dodge, his heirs, representa-
"tives, executors, administrators and assigns that, in case any time
"before the expiration of the term of said lease the said Church-
"Dodge Company shall be or become insolvent, or shall make a
"general assignment, or shall be adjudicated bankrupt under the
"bankruptcy act of the United States or shall pass into the hands of
"a receiver appointed by any court of competent jurisdiction in any
"legal proceedings by or against said Church-Dodge Company, then
"and in such case, or in either such case, the term of said lease shall
"immediately expire and all improvements, fixtures, counters, shelv-
"ing, show cases, cash system, soda fountain, machinery, appli-
"ances, partitions, railings, store fixtures and furniture of every
"kind and description, which shall at such time have been erected,
"and placed in said demised premises, shall immediately be sur-
"rendered with said demised premises and shall be and become the
"property of said James E. Dodge, his heirs, representatives, exec-
"utors, administrators and assigns, by virtue of said lease and
25 "this agreement, and in consideration of the letting of said
"demised premises together with the consideration aforesaid.

"In witness whereof the Church-Dodge Company has caused this
"instrument to be executed in its name by its vice-president and has
"caused its corporate seal to be hereunto affixed this 8th day of
"September, 1902.

"CHURCH-DODGE COMPANY,
[SEAL.] "By WM. J. HARPER, *V. P.*"

(Acknowledgment not printed.)

Mr. BARHITE: I offer in evidence certified copy of the deed between James E. Dodge and Josephine M. Dodge to the Century Mercantile Company, a domestic corporation of Troy, dated March 5, 1903, and executed on the same date. This is a conveyance of the property mentioned in the lease, which is in evidence from Mr. Dodge to the defendant the Century Mercantile Company.

Mr. BAILEY: I make the same objection on the part of defendant Murphy to the receipt of that deed in evidence.

Received. Exception. Marked Exhibit 3.

(Contents of this instrument appears from above statement.)

Mr. BARHITE: I offer in evidence certified copy of an order changing the corporate name of the Church-Dodge Company to the

Dodge Dry Goods Company, made at a Special Term of the Supreme Court held in Albany, on the 8th day of November, 1902.

26 Mr. BAILEY: I object to it upon the same grounds as before.

Received. Exception. Marked Exhibit 4.

(The effect of this order is stated above.)

Mr. BARHITE: I offer in evidence contract dated February 27, 1903, made between the plaintiff and William Schwarzwaelder & Co. This is the contract under which the show cases were made.

Mr. BAILEY: On behalf of the defendant Murphy, I object to this as incompetent, irrelevant, and on the further ground that no connection is shown between Schwarzwaelder & Co. and the Dodge Dry Goods Company. I have in my hand the contract that was made between Schwarzwaelder & Co. and the Church-Dodge Company, which includes the property which is mentioned there, and other property as well. I think it should precede the contract offered in evidence by the plaintiff.

Received. Exception.

Mr. NORTON: I object, as incompetent and inadmissible against the Century Mercantile Company.

Received. Exception. Marked Exhibit 5.

(This agreement was as follows:)

"NEW YORK, *February* 27, 1903.

"We, John Hofman Co., of Rochester, New York, propose to make "and set up about 314 feet of show cases as per William Schwarz- "walder & Company's drawings, floor plans and specifications to

"size and inside trimmings of show cases, with glass shelves

27 "and different metal appliances. All cases to be made of "quartered oak and finished to sample submitted and to have "plate glass tops, front and ends, back to be finished with German "plate mirrors in sliding doors to slide on brass tracks and anti- "friction rollers for the sum of thirty-eight hundred and fifty dol- "lars ($3,850), delivered and set up. If the three cases around the "posts are used we are to get one hundred and fifty dollars ($150) "extra for same.

"It is understood that from the point in the floor to the main "entrance there is a drop of about 9 3-8 inches which has got to be "taken care of in elevating the cases from this entrance back to "nothing.

"We agree to deliver and set these cases up to Church-Dodge "Company's store at Troy, N. Y., not later than the 15th day of "April, 1903, or sooner if possible."

"Partial shipment to be made as soon as convenient.

(Then follows the specifications with regard to the manner in which the show cases are to be made, being the same specifications named in the complaint.)

After the specifications are the words:

"JOHN HOFMAN CO.
"CHAS. HOFMAN.

"Accepted February 27, 1903.
"WILLIAM SCHWARZWAELDER & COMPANY.
"V. H. EVERSON, *Treas.*"

28 Mr. BARHITE: I offer in evidence letter, dated Troy, N. Y., March 7, 1903, addressed to the John Hofman Co., and signed by James E. Dodge, president of the Dodge Dry Goods Co.

Mr. BAILEY: I object to it, on behalf of the defendant Murphy, as incompetent, irrelevant, having no relation to the contract, relating only to the acceptance of a proposed order, which tends to vary a contract, and is not made by the party to the contract which has been put in evidence, and not bearing upon the question of title presented by the plaintiff. Our proposition on this branch of the case is this: He has put his contract in evidence. The question of the completion of his contract and the payment of it rests entirely between the Hofman Co. and Schwarzwaelder & Co.; that any further assurance coming in the form of an acceptance of the order, or a guaranty, or anything of that character from the Dodge Co. is in the nature of a collateral contract, or guaranty, and can have no bearing upon the title which is the subject of the plaintiff's action.

Received. Exception.

Mr. NORTON: On behalf of the Century Mercantile Co. I make the same objection, and, also, as hearsay.

Received. Exception. Marked Exhibit 6, which is as follows:

"NEW YORK, *March* 7, 1903.

"Messrs. John Hofman Co., 32 South Water St., Rochester, N. Y.:

"GENTLEMEN: We are advised by William Schwarz-
29 "waelder & Company that they have arranged with you to "give an order upon us for the Silent Salesman Show Cases "which you are to furnish upon their contract with us. The fact "that such an arrangement has been made of course makes it un- "necessary for us to give you the guarantee suggested in your letter "of the 4th inst. You may file the order referred to with us and we "will protect you upon it by seeing that the amount of the order is "paid to you out of the first money due the contractor, William "Schwarzwaelder Company, on their contract with us. Of course "our acceptance of your show cases will depend upon their meeting "with requirements of contract.

"Respectfully yours, JAMES E. DODGE, *President*."

Mr. BARHITE: I offer in evid-nce letter, dated March 10, 1903, written to the Dodge Dry Goods Co., by the John Hofman Co.

Mr. BAILEY: I object to its receipt, on behalf of Mr. Murphy, as incompetent, irrelevant and hearsay against him, and for the reasons mentioned in my objection to the last offer.

Received. Exception.

Mr. NORTON: I object to it, upon the same grounds, as to the last paper.

Received. Exception. Marked Exhibit 7, which is as follows:

"MARCH 10, 1903.

"The Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: Your letter of March 7th, signifying you
30 "would protect an order from Mess. Schwarzwaelder & Co., to
"pay us for cases at hand, and we thank you for same, but
"up to the present time we have not received the order from Mess.
"Schwarzwaelder & Co.

"They wrote us on the 7th, saying they would enclose order, but
"as it was not enclosed in their letter we suppose they overlooked it
"when closing envelope.

"Referring to that part of your letter wherein you says, *'Your*
"*acceptance of show cases will depend upon their meeting with*
"*requirements of contract,'* will say that we do not know if the
"contract between Mess. Schwarzwaelder & Co., and ourselves is the
"same between Mess. Schwarzwaelder & Co., and you, therefore we
"beg to repeat the contract between Schwarzwaelder and Co., and
"ourselves, and with regard to which we wish you to advise us if
"correct and satisfactory to you or otherwise: (Here contract is
quoted.)

"Another point we want positively decided is, the measurements
"specified in the contract do not compare accurately with the scale
"ground plan they furnished us, therefore we wish you to furnish
"us with a correct floor plan, showing accurately the location of
"posts with regard to cases and measurements. We suppose it will
"be no trouble for you to get this from your architect.

"Upon receipt of the above matter being properly adjusted, we
"are ready to commence work on the cases, and will hasten them to
"completion. We would also state that by replying promptly
31 "you will aid us in getting the work under way as soon as
"possible, and we remain

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN."

Mr. BARHITE: I offer in evidence letter, dated March 11, 1903, to John Hofman Co., signed by James E. Dodge, president.

Mr. BAILEY: On behalf of the defendant Murphy, I object to the receipt of that letter in evidence upon all the grounds specified in my objection to the former letters.

Received. Exception.

Mr. NORTON: I object, upon the same grounds as before, to the last two exhibits.

Received. Exception. Marked Exhibit 8.

"TROY, N. Y., *March* 11, 1903.

"Messrs. Hofman Company, 32 South Water St., Rochester, N. Y.

"GENTLEMEN: Your favor of March 10th at hand and its con-
"tents noted. We have received the notification from Messrs.
"Schwarzwaelder & Co. of New York, and have written them stating
"that we have received this order and placed it on file. If you

"would kindly forward to us your signed order from them to you we "will place that on file, and I believe that will straighten the matter "of payment up.

"Will you kindly send us the drawings of the three show-
32 "cases that you purpose to erect around the post? I note "that you neglected to state that all silent show-cases to have "three glass shelves 8, 10 and 14" wide, with finished rounded edges, "unless otherwise specified.

"A contract between Messrs. Schwarzwaelder and yourselves, out-"side of a little change spoken of above, is the same as the contract "that we have. There is a drop in the floor from a given point to "the main entrance of about 9½ inches which starts at nothing. "In order to save delay I have detached the first floor plans of the "set of plans that I have and would ask you to kindly return this "to us when you are finished with the same.

"Messrs. Schwarzwaelder & Co. scaled the fixtures to a copy of the "plans that I am sending you under separate cover by this mail, and "I think that you will find that the measurements given are correct, "although I cannot state. If they are not correct kindly write them "and they will furnish you with any information that you desire.

"Yours respectfully, "JAMES E. DODGE, *President.*"

Mr. BARHITE: I offer in evidence order, dated March 16, 1903, upon the Church-Dodge Co., signed by Schwarzwaelder & Co., directing the Church-Dodge Co. to pay money to the John Hofman Co., and also letter from the Dodge Dry Goods Co. to the Hofman Co. accepting the order.

Mr. BAILEY: On behalf of the defendant Murphy I object to this order, as incompetent, irrelevant, not admissible under the complaint, bearing solely upon the matter of payment, and not upon any
33 question of title presented by the plaintiff; also, upon the ground that in its present form it is indefinite and ambiguous as it refers to the floor plan and detail therefore O. K.'d by Mr. Dodge, and that that should be offered in connection in order to make it definite. As to the letter offered in connection with it, I make the same objection as I have done to the previous letters.

Received. Exception.

Mr. NORTON: The Century Mercantile Company interposed the same objection.

Received. Exception. Marked Exhibit 9, which is as follows:

"NEW YORK, *March* 16, 1903.

"Messrs. Church-Dodge Company, Troy, N. Y.

"DEAR SIRS: Please pay to the order of the John Hofman Co., "Rochester, N. Y., thirty-eight hundred and fifty dollars ($3,850) "thirty days after completion or 2 per cent. ten days when they have "delivered and set up complete to your entire satisfaction, in your "store at Troy, N. Y., the glass show cases in accordance with con-"tract and your floor plans and detail O. K.'d by your Mr. James

"E. Dodge. This order supercedes previous orders on Messrs.
"Church-Dodge Company.
"Respectfully yours,
"WILLIAM SCHWARZWAELDER & CO.
"V. H. EVERSON, *Treas.*"

34 "TROY, N. Y., *March* 19, 1903.

"Messrs. John Hofman Co., 32 South Water St., Rochester, N. Y.
"DEAR SIR: Your favor of the 17th inst. to hand and its contents
"noted. The order that we received from Wm. Schwarzwalder & Co.
"we beg leave to acknowledge receipt of, and inform you that we
"will accept same.
"Yours respectfully,
"JAMES E. DODGE, *President.*"

Mr. BARHITE: I do not suppose you make any question but that is the order which is the order which they accepted.
Mr. BAILEY: I don't know anything about it.
Mr. BARHITE: I offer in evidence letter dated March 17, 1903, addressed to the Church-Dodge Co. by the John Hofman Co.
Mr. Bailey objected as before, as against the defendant Murphy.
Received. Exception.
Mr. Norton objected as before, as against the defendant the Century Mercantile Co.
Received. Exception. Marked Exhibit 10.
(This is as follows: On letter head of John Hofman Co.)

"ROCHESTER, N. Y., *March* 17, 1903.

"Mess. Church-Dodge Co., Troy, N. Y.
"GENTLEMEN: Enclosed please find order from Mess. Schwarz-
"walder & Co., directing you to pay us $3,850 when we shall
35 "have satisfactorily furnished you certain cases. Please
"acknowledge receipt of this order and advise us that you
"will honor same and oblige.
"We are also in receipt of a corrected floor plan from Mess.
"Schwarzwalder & Co., which gives us all the information needed
"in regard to measurements, and we remain
"Yours very truly,
"JOHN HOFMAN CO.,
"By JOHN HOFMAN.

"Enclosure."

Mr. BARHITE: I offer in evidence letter to the John Hofman Co., signed by James E. Dodge, dated Troy, N. Y., March 16, 1903.
Mr. BAILEY: I object to it as incompetent and irrelevant as against the defendant Murphy, and as an attempt to modify a contract made by one not a party to it.
Received. Exception.
Mr. NORTON: I object to it as before, and also as hearsay against the defendant the Century Mercantile Co.
Received. Exception. Marked Exhibit 11.

"TROY, N. Y., 3/16/03.

"John Hofman Co.

"GENTLEMEN: I have made some changes. The total number of feet is the same in the changes as specifications called for.

"Yours respectfully,

"JAMES E. DODGE.

36	"Lace	40
	"Ribbon	41
	"Glove	25–6
	"Jewelry	32
	"Silk	27
	"Gents, two	37–6
	"Underwear	68
	"Hosiery	43
		"314"

Mr. BARHITE: I offer in evidence letter dated March 18, 1903, addressed to the Church-Dodge Co., signed by the John Hofman Co.

Mr. Bailey objected, as before, for the defendant Murphy.

Received. Exception.

Mr. Norton objected, as before, for the defendant the Century Mercantile Co.

Received. Exception. Marked Exhibit 12.

"MARCH 18, 1903.

"Mess. Church-Dodge Co., Troy, N. Y.

"GENTLEMEN: Your letter of the 16th enclosing plans for show "cases showing changes desired at hand, and in reply have to say "that after mailing you the plans Saturday for your approval, we "received another set from Messrs. Schwarzwaelder & Co., and a let- "ter saying that their representative had just returned from your "city and the arrangement of cases shown on the new plan was as "you and their superintendent had finally decided upon, and that

"they had the counters and wood-work well under way ac-
37 "cording to same and in consideration of the time that has
"already been wasted in getting the matter in shape they "very emphatically requested us to hasten our work as rapidly as "possible; therefore, as the work has so far progressed, we do not see "how the changes can now be made. The changes you have noted "do not differ greatly from the corrected plan of Schwarzwaelder & "Company, excepting that they do not show the additional case you "have marked for the underwear department, but they have, how- "ever, added a case to the hosiery department, which brings up the "total number of feet to about the quantity called for in the con- "tract. As we now have the work under way you will have to ad- "vise us by wire on receipt of this letter instructing us to stop work "on them; otherwise we shall conclude that you consent to having "the cases as we are making them, and we remain

"Yours very truly,

"JOHN HOFMAN COMPANY."

Mr. BARHITE: I offer in evidence letter, dated March 18, 1903, addressed to the John Hofman Co. by Schwarzwaelder & Co.

Mr. BAILEY: I object to it on the part of the defendant Murphy, as incompetent, irrelevant and hearsay, and not admissible under the pleadings.

Received. Exception.

Mr. NORTON: I object to it, as before, on behalf of the defendant the Century Mercantile Company.

Received. Exception. Marked Exhibit 13.

38 "CHICHESTER, N. Y., *Mar.* 18, 1903.

"Messrs. John Hofman Co., Rochester, N. Y.

"GENTLEMEN: I am in receipt of your letter of the 17th, and "note that you have the floor plan and everything is clear and "straight, so you can go ahead. The pencil sketch on the margin "shows the shape and size of all the columns on the first floor of the "Church-Dodge Building. The diameter of the post is 13", and "has a square base 19" x 6" high. In your contract with Wm. "Schwarzwaelder & Company, if the three cases around the post are "to be used, you are to receive $150 for the same from Wm. "Schwarzwaelder & Company or from me. We have charged Dodge "$250 for doing this work and he has accepted that price. We are "simply waiting for your Mr. Chas. Hofman to furnish us "the drawings in order to forward them to Church-Dodge Company "and secure their order for this extra work. Now it is immaterial "to me whether this is done through me or direct, as long as you "charge Church-Dodge $250 for the work and pay me the differ-"ence of $100. As I have sold all of the show-cases for which "you have a contract to the Church-Dodge Company for $3 more "than I estimated, and am paying you by the order on Church-"Dodge Company, I feel that I ought to have a little benefit out of "this work to pay for the labor and trouble had in connection with "this part of the contract and believe that you will quite agree with "me that I am entitled to something. Please advise whether you "will take the matter up direct with Church-Dodge Company, quot-

"ing them $250 and protecting us to the extent of $100, or

39 "whether you will send the drawings to Wm. Schwarz-

"waelder & Company as promised by Mr. Chas. Hofman, "and write the Church-Dodge Company that you have taken up the "matter direct with Wm. Schwarzwaelder & Company.

"Yours very truly,

"L. A. SCHWARZWAELDER,
"Per WM. O. SCHWARZWAELDER."

Mr. BARHITE: I offer in evidence letter from the Dodge Dry Goods Co. to John Hofman Co., dated March 19, 1903.

Mr. BAILEY: I object, as before, in behalf of the defendant Murphy.

Received. Exception.

Mr. Norton objected as before.

Received. Exception. Marked Exhibit 14.

"TROY, N. Y., *March* 19, 1903.

"Messrs. John Hofman Co., 32 S. Water St., Rochester, N. Y.

"GENTLEMEN: Your favor of the 18th inst. to hand and its contents noted. Kindly do not make the change as suggested in my letter of the 10th but keep in conformity with signed plans. You may make us one case the length of the difference between your contract and what the floor plans show and we will use this case somewhere in the store.

"Your respectfully, J. E. DODGE, *President.*"

40 Mr. BARHITE: I offer in evidence letter, dated April 10, 1903, addressed to the John Hofman Co., signed by Schwarzwaelder & Co.

Mr. BAILEY: On behalf of the defendant Murphy, I object to it as incompetent, irrelevant and hearsay.

Received. Exception.

Mr. MORTON: I object to it, on behalf of the defendant, the Century Mercantile Company, upon the same grounds as before, and also as hearsay.

Received. Exception. Marked Exhibit 15, which is as follows:

"APRIL 10, 1903.

"Messrs. John Hofman Co., Rochester, N. Y.

"DEAR SIRS: Replying to yours of April 8th to Mr. Schwarzwaelder at Chichester received, would say that the order taken for cases around the posts for the Church-Dodge Co., was a verbal one at $250.00 which were to match the cases identically with these in the Adams & Co. store, 6th Ave. N. Y. City.

"In sending the Church-Dodge Co. a copy of the contract between us, we eliminated the clause, relative to the cases around the posts, because these cases were not in our contract with them and wrote you that we had quoted Church-Dodge Co. $250.00. In as much as you have seen fit to take the matter up direct with them, after having been advised by us the price we will have nothing further to do about it, you can settle the matter with the Church-Dodge Co., and we will hold you for the $100.00, our profit in the transaction.

41 "As soon as you had the order, you took the matter out of our hands by taking it up direct with the Church-Dodge Co., and the deal now is entirely between the Church-Dodge Co., and yourselves. In order to avoid any complication or further discussion, we wish to say that we have assigned our contract with you to the Church-Dodge Co. You having our order on them for the amount of the contract, covering show cases, when the job is completed to the entire satisfaction of the Church-Dodge Co., and in accordance with our contract.

"Respectfully yours,

"WM. SCHWARZWAELDER & CO.,
"V. H. EVERSON, *Treas.*"

The COURT: As a trustee in bankruptcy, you do set up that you have some title—that you have title as trustee in bankruptcy?

Mr. BAILEY: The individual was sued in this action, and the individual sets up in his defense that he never had possession, or control, or anything to do with this property; that it was in the possession and custody of the United States Court during all these times, and pleads that in bar. It is in the possession of another court which exercises exclusive jurisdiction with reference to it. That is the defense that is pleaded here.

Mr. BARHITE: I offer in evidence letter, dated April 20th, to the John Hofman Co., signed James E. Dodge, president. This is a letter with reference to the three cases, which shows that an order was given directly to the Hofman Co., for the three cases.

42 Mr. NORTON: I object to it, as incompetent and hearsay, as against the defendant, The Century Mercantile Co.

Received. Exception. Marked Exhibit 16.

"TROY, N. Y., *April* 20, 1903.

"Messrs. John Hofman & Co., 32 S. Water St., Rochester, N. Y.

"GENTLEMEN: Your favor of the 17th inst. to hand. The price "that you contracted to make these three cases for were $50 apiece, "making $150 for the three. This sum I will see is remitted direct "to you.

"Yours respectfully, J. E. DODGE, *President.*"

Mr. BARHITE: I offer in evidence letter dated June 16, 1903, to the John Hofman Co., signed by James E. Dodge, president, and also letter between the same parties, dated June twentieth. These are the letters in which they refuse to accept the cases.

Mr. BAILEY: On behalf of the defendant Murphy I object to the receipt of each of these letters, separately, upon the ground that they are incompetent, irrelevant, hearsay as against this defendant, and not written by a party to the contract, under which plaintiff built these cases; that they have no reference to the three post cases which were the subject of a direct contract between the plaintiff and the Dodge Co.; that they relate to matters not in issue in this

43 action, and upon the further ground that they were written after the actual acceptance of the work and show cases by the Dodge Co., and in support of that last objection I offer in evidence a letter written by the plaintiff, dated June 5, 1903.

Mr. BARHITE: I object to its being offered in evidence now.

Mr. BAILEY: Our position is this: These things were not of a character to require any extended examination or inspection. Now they were accepted when they were put in there about the first of June. The fact is that the Dodge Co. put them into immediate use and continued in the constant and immediate use of these articles from the moment of their installation and acceptance at that time. An acceptance was made to a representative of the plaintiff who was there. He was there and set up the last cases about the first of June. He appears and reports the fact of such acceptance by the Dodge Co. to the plaintiff, and this is a letter of the plaintiff stating that fact. Now, if the acceptance or non-acceptance of the Dodge Co. has any materiality in this case, it was an act that was to be accomplished at

some time or other. It was their acceptance or non-acceptance. Now, that is to be determined by one thing principally, and that is, by what the Dodge Co. did. Now, if they did accept it, and there is the plaintiff's declaration to that effect, then it is impossible for them thereafter to refuse to accept goods of this character. Not only that, I offer to show further, in support of my objection, the fact to be that all these articles were placed into immediate use when delivered to the Dodge Co. and continued in such use as long as it continued in business.

44 Mr. BARHITE: That is all a matter of defense.

Mr. BAILEY: Will the court receive a letter of June fifth in that connection?

The COURT: It is not in order, and I do not receive it now.

Mr. BAILEY: I except to the refusal to receive the letter, which I ask to have marked "Defendant's Exhibit No. 40, for identification."

(Defendant's Exhibit No. 40, for identification, is as follows:)

"ROCHESTER, N. Y., *June* 5, 1903.

"The Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: Mr. Sherwood has returned and reports the cases "completely and satisfactorily set in place Tuesday night, and we "herein enclose invoice for same, and remain

"Yours very truly,

"JOHN HOFMAN CO.,
"By PIERCE.

"Enclosure."

The COURT: I will receive the letters of June sixteenth and June twentieth in evidence.

Exception by Bailey.

Mr. NORTON: On behalf of the defendant the Century Mercantile Co. I make the same objection.

Received. Exception.

Mr. BAILEY: Our objection and exception are to apply separately as to each of these letters?

The COURT: Yes.

45 Letter dated June sixteenth, marked Exhibit 17.

Letter dated June twentieth, marked Exhibit 18.

(Plaintiff's Exhibit No. 17 is as follows:)

"TROY, N. Y., *June 16th*, 1903.

"John Hofman Co., 30-32 South Water St., Rochester, N. Y.

"GENTLEMEN: Your letter of date, the 5th instant, enclosing "what you term a statement for show cases as per plans, specifica- "tions and contract, etc., was received upon the return of the writer "after an absence from the city and is now given immediate atten- "tion.

"The contract on which you undertook to build and install fix- "tures for us required that they be installed in our store upon the "15th of April, 1903. When that time arrived, you will remember,

" that, at your request, the time was extended to April 22, 1903.
" No further extension was allowed and you were duly notified that
" your delay was doing us great damage and that we would hold
" you for that damage. Among other items of damage which your
" delay caused us was the postponement of our opening for at least
" two weeks. This meant, as I explained to you in April, a loss of
" great amount because our business was substantially stopped while
" our expenses continued.

" You also caused us damage by your delay in expenses to which
" we were put to find out why you were not installing our fixtures.
" Among other expenses, a trip to Rochester by our Mr. Dodge, cost
" us about $20.

46 " Then again, the glove case which you finally furnished
" is not the glove case called for by the contract and specifica-
" tions. It should be all glass, which, as you knaw, it is not. We, of
" course, do not accept this case as meeting the requirements of the
" specifications and contract, and hereby so notify you.

" Again, one of the plate glass ends in the case was cracked when
" placed. We cannot allow such a defect and hereby so notify you.

" We will be glad to take this whole matter up with you for the
" purpose of reaching a proper adjustment, if possible. You will
" appreciate that we are not in the least to blame for the deficiencies
" and delays which have come, all in plain disregard of the terms of
" the contract and likewise in disregard to our repeated admonitions
" to you. If we can adjust matters on a fair and proper basis, which
" will do justice to you and to ourselves, we will be pleased to do so.
" However, pending such a result, we refuse to accept your case and
" work.

" Yours very truly, JAS. E. DODGE."

(Plaintiff's Exhibit No. 18 is as follows:)

" TROY, N. Y., *June* 20, 1903.

" John Hofman Company, 30-32 South Water St., Rochester, N. Y.:

" GENTLEMEN: We have your letter of date of the 18th inst. in
" reply to our letter of date of the 16th instant, and we have given to
" the matter our most careful attention. While not in any way
" receding from the position taken in our last letter and
47 " solely in answer to your suggestion as to what we would
" consider a proper settlement of the differences now existing
" between us, we have decided to present to you at much lower figures
" than the real damage done us, the following items which for the
" purposes of a compromise of our difference, and for no other pur-
" poses, we suggest as a proper settlement of the matter. Of course,
" if this suggestion does not meet with your approval we are not to
" be prejudiced by the figure which we here give, as the items are
" lower than the real damage in most instances, and besides there
" are other items of damage which if necessary we will be compelled
" to ask you to make good to us. But for the purpose of putting the
" matter in some kind of definite form, and as a proposition of settle-
" ment without litigation, we suggest that we retain the fixtures upon

"your making to us the following allowances, as our damages for "delay and imperefct performance of the contract: Delay of 12 "days at a daily expense of $150 to us—$1,800; freight and cartage "paid by us—$15; extra men furnished for unpacking, &c.—$50; "difference between case improperly furnished and proper case— "$300; broken plate glass—$7; expenses of Mr. Everson to Roch- "ester—$30; expenses of Mr. Dodge to Rochester—$20; total, "$2,222. In addition to the foregoing, we should also require that "you fix up your work upon our first floor in the portion where the "slant in the floor had to be taken care of. This work is not prop- "erly done. The material which you procured in Troy with which "to do the piecing out that was done does not correspond in color

"and is not satisfactory in finish to meet the requirements of
48 "the contract. It does not look well and ought to be done
"over in proper form as a part of this proposed settle- "ment.

"Now, if you will meet the proposition here made for the pur- "pose and for the sole purpose of avoiding any controversy or litiga- "tion about the matter, then we will accept your cases, &c., and close "the matter on that basis. If, however, you decide not to accept "this proposition, then it is understood that it is made solely for the "purpose of compromise and without prejudice to our rights to de- "mand our full damage. It is also understood that any delay pend- "ing this proposition of settlement is not to prejudice our rights in "the premises.

"It is our policy to adjust and settle differences rather than to get "into any prolonged and unpleasant controversies, but, as you are "doubtless aware, it is impossible always to avoid such controversies, "and they are such in this case that they cannot be ignored.

"Very truly yours,

"JAS. E. DODGE, *Pres.*"

ALEXANDER B. KING, JR., sworn.

To Mr. BARHITE:

I live at Troy, N. Y. Am law clerk in the office of Henry W. Smith. I know the Century Mercantile Co., of Troy, the defendant in this action, and know its officers, or at least a part of them. I served a copy of this paper now shown me upon James Dodge, who was an officer of the Century Mercantile Co., on the 3d day of October, 1903, at the store of the Dry Goods Co. I left a copy with him.

49 Mr. BARHITE: I offer the paper in evidence.

Mr. BAILEY: I object to it as incompetent, as against the defendant Murphy.

Received. Exception.

Mr. NORTON: I object to it upon the ground that there is no proof in this case that the Century Mercantile Co. ever had possession of the articles in suit.

Received. Exception. Marked Exhibit 19, which is as follows:

"To the Century Mercantile Company.

"GENTLEMEN: The John Hofman Company, a domestic corpora-
"tion, demands possession and delivery by you of certain show cases
"and store fixtures belonging to the said John Hofman Company
"and heretofore in the possession of the Dodge Dry Goods Company,
"which show cases and store fixtures are more particularly described
"in Schedule A, hereto annexed and made a part hereof.

"Dated October 2nd, 1903.

"Yours, etc.,

"JOHN HOFMAN COMPANY,
"By JOHN HOFMAN, *Pres.*"

Attached to the above exhibit is a schedule of the same chattels mentioned and described in the complaint.

Q. Was that schedule annexed to the notice which you served?

A. It was.

50 EDSON E. PIERCE sworn.

To Mr. BARHITE:

I live at Rochester Junction. I was in the employ of the John Hofman Co., the plaintiff in this action, in August, 1903. I went to Troy in that month, at the request of the plaintiff. I saw Mr. Murphy, the defendant, there, at his office. Mr. Charles Hofman was with me.

Q. I show you a paper and I ask you whether or not you delivered to Mr. Murphy a copy of that paper?

Mr. BAILEY: I object to the question as incompetent, irrelevant and immaterial against the defendant Murphy, upon the ground that the paper could not be received in evidence as any proof of any demand upon the defendant in this action. I submit to the court for his inspection. It is addressed to the receiver and not to the individual, and we submit it recognizes on the part of the plaintiff that the goods and chattels are in the possession of the receiver. While it might have some force upon the receiver, it is not a demand upon the individual, and cannot be made the basis of an action against an individual, and the plaintiff is estopped from prosecuting this action against the individual upon the demand now produced, because it recognizes the possession of the receiver.

Received. Exception.

A. Yes, sir.

Q. Was this schedule here, marked Schedule A, attached to the copy?

A. Yes, sir.

Mr. BARHITE: I offer the paper in evidence.

Mr. BAILEY: I object, upon all the grounds stated in the objection to the above question, to the admission of this paper in evidence.

Received. Exception.

51 Mr. BARHITE: The Century Mercantile Co. makes the same objection.

Received. Exception. Marked Exhibit 20, which is as follows:

"Edward Murphy, 2d, Receiver, etc., of Dodge Dry Goods Company,
"Troy, N. Y.

"SIR: The John Hofman Company, a domestic corporation, "hereby demands possession and delivery from you of certain show "cases and store fixtures heretofore in the possession of said Dodge "Dry Goods Company, an alleged bankrupt, which show cases and "store fixtures are more particularly described in schedule A hereto "annexed and made a part hereof.

"Dated August 20, 1903.

"Yours, etc.,

"JOHN HOFMAN CO.,

"[L. S.] "By JOHN HOFMAN, *Prs.*

"(Schedule A, referred to, contained a description of the property described in the complaint.)"

At the time I served this paper upon Mr. Murphy, as I remember, there was no particular, definite conversation, more than we called at Mr. Murphy's office, Mr. Hofman being acquainted with him, and they carried on a friendly conversation. I do not remember that there was anything said about the return of the show cases, or anything outside of this notice.

52 To Mr. BAILEY:

I saw these show cases that day in the store. I cannot positively state whether or not that store was in possession of the receiver in bankruptcy at that time. I did not have any information to that effect, only we served that paper on Mr. Murphy, and it is my impression that he was in possession at that time, as receiver. I had heard that a receiver had been appointed of the Dodge Company, that is why I went to Troy, I suppose. I went into Mr. Murphy's office on that day twice, the first time Mr. Charles Hofman was with me. I do not recollect what Mr. Hofman said to Mr. Murphy. I did not serve this paper, marked Exhibit 20, at that time. We called on Mr. Murphy the first time in the morning, and the last time was in the afternoon, in the meantime we went to lunch at Mr. Hofman's hotel, the Windsor House, I think. We called at the store, I mean the store in the possession of the receiver, the one where these show cases were. I saw the goods in the show cases. I went back to Mr. Murphy's office in the afternoon alone. I met Mr. Murphy at the door just inside the door. I presented that paper that you have in your hand. I think I said nothing, more than I had that paper to present to him. He read the paper and told me that he must object to delivering the goods to us, he said nothing more. He did not say anything about his being receiver. He simply said he must object to delivering the cases. I cannot positively repeat his words, after three years' time. I wouldn't swear those were his words, but those were the intent, that he must object to the delivery of the cases to us. I cannot recollect the words that he

used, not his positive words. To the best of my recollection, Mr. Murphy, when he was handed that paper, told me that he
53 couldn't deliver the goods pursuant to its demand. That is all there was to it. I was there this last time simply long enough to present that paper to him, and for him to read it through, and for him to give me that answer. I brought this paper from Rochester. It was prepared at Mr. Barhite's office. I was informed by Mr. Barhite's office to go to Mr. Murphy's office a second time. I telephoned to Rochester in the meantime. As to anything said about the receiver in that talk over the telephone, I couldn't say; I don't recollect. I was the one that telephoned myself.

Q. Anything said about the bankruptcy of the Dodge Co.?

A. The entire conversation was with regard to that matter, but what the definite conversations was, at the present time I couldn't remember.

The COURT: Was there anything said about the Dodge Co., or a receiver being appointed?

A. Yes, the conversation was with regard to the Dodge Co., and presumably, the receiver. That is the best of my recollection about it. It was after that conversation and pursuant to directions that I went and served this notice on the receiver. It is a fact that Mr. Hofman and I went to Troy at this time because of the announcement that the Dodge Dry Goods Co. had gone into bankruptcy.

To Mr. BARHITE:

Q. At the time you were in Troy, in August, 1903, do you know whether I was in Rochester at that time?

Mr. Bailey objected, as immaterial.
Received. Exception.

54 A. I think not. You weren't at your office.

Q. You did not have any conversation with me over the telephone?

Mr. Bailey objected as before.
Received. Exception.

A. No, sir.

I left the employ of the Hofman Co. a year ago this March. I had charge of the books there.

Q. Was this amount for these show cases ever paid by anybody to the Hofman Co., so far as you know?

Mr. BAILEY: I object to it as incompetent and immaterial as against the defendant Murphy.
Received. Exception.

Mr. NORTON: I object to it, upon the same ground, as against the Century Mercantile Co.
Received. Exception.

A. No, sir.

With regard to the conversation I had with Mr. Murphy, I did

not give his exact words, but what I have stated was the substance of what he said.

To Mr. BAILEY:

Q. I show you the paper marked defendant's Exhibit 40, for identification, and I ask you if you are the Pierce whose name is written on there?

A. Yes, sir. I wrote that letter pursuant to the direction of some of the officers of the John Hofman Co.

Q. I show you a paper, and I ask you if that is the invoice that is mentioned in the paper marked Exhibit 40, for identification?

A. Yes, sir, and was sent by me for the Hofman Co. to the Dodge Co. at about the day of its date.

55 Paper marked Defendant's Exhibit No. 41, for identification, as follows: (On bill-head of John Hofman Co.)

"ROCHESTER, N. Y., *June* 2, 1903.

"Sold to The Dodge Dry Goods Co.
"Order No. 4843. Shipped via Troy, N. Y.
"Terms, 30 days, or 2% for cash in ten days.

"314 foot of Show cases as per plans, specifications and	
" contract	$3,850 00
"3 Cases around the posts	150 00
	"$4,000 00"

I had no conversation with anyone in this store. I think Mr. Hofman simply spoke to Mr. Dodge. I think he just merely greeted him. I do not recollect anything further in the way of conversation.

Mr. BARHITE: I offer in evidence the requisition in replevin in this action, and the sheriff's return.

Mr. BAILEY: I object to the receipt of this return in evidence, in behalf of the defendant Murphy, upon the ground that the plaintiff is concluded and estopped from proving a return of the character of the return before us, which is to the effect that the sheriff of Rensselaer county replevied this property on the 6th of October, 1903, from the possession of the defendant. The reason why I object to this offer is this: A motion was made by the defendant Murphy to change the venue of this action. In that motion he alleged that the property was not taken into the possession of the sheriff of Rensselaer county, and was not replevied in 1903, and was not replevied until October 14, 1904, and stated several wit-

56 nesses by whom he intended to prove that state of facts. On the argument of that motion Mr. Barhite submitted an affidavit containing the following, on page 52 (reads from the affidavit of Mr. Barhite, verified November 4, 1904, as follows:)

" That said defendant's claim, in folio 11 of William J. Harper's " affidavit on this motion, that said chattels were replevied and taken " from the possession of William E. Murphy and from the building

"on the southwest corner of State street, Troy, N. Y., where they "had been since their delivery to Dodge Dry Goods Company on the "instigation of the plaintiff on *on* October 14, 1904, and that said "chattels are still in the city of Troy, N. Y., and defendants further "claim in their said affidavit that they desire the presence of six "witnesses to prove these facts. There is no doubt that said chattels "were replevied at the time stated, at the instigation of the plaintiff, "under the writ of replevin heretofore referred to, and the return "of the sheriff of said writ shows said facts."

Now, the sheriff did make a return which was on file at the — that motion was argued, in which he certified these goods were replevied in 1904. Afterwards an order was obtained by the sheriff permitting him to amend that return, but we were not aware any amended return had ever been filed. We were assured by the clerk of this county that there was no amended return ever filed. Now, one is produced. There is a concession made upon the motion for a change of venue which conceded, on the part of the plaintiff, the very proposition that is one of the strong elements of our defense. We, relying upon that position asserted by the plaintiff, and to which
57 effect must have been given by the court in determining that motion, are here in court without witnesses to prove those facts. I submit that we have acted upon the concession made by the plaintiff in court. We have relied upon it and he is estopped from now proving, or attempting to prove, any state of facts different from that which he asserted.

Mr. BARHITE: The sheriff's return is conclusive evidence to both parties of the facts which it contains.

Mr. BAILEY: I offer certificate in evidence, that I received from the clerk only this morning, to the effect that no amended return had been filed. I made the inquiry last week, and was told there had not been. This return, to which counsel refers, has no filing mark upon it whatsoever. That is the situation, so far as that is concerned. I offer it in evidence, the certificate of the clerk, that there was no amended return on file in support of my objection. I was not aware that there was any return filed here.

The COURT: I will receive the sheriff's return in evidence.

Mr. Bailey excepted.

Mr. NORTON: I make the same objection, on behalf of the Century Mercantile Co., and except to its reception.

Mr. BAILEY: I offer the certificate in evidence in support of my objection and to show good faith on our part.

The COURT: I will receive it.

Certificate marked "Defendant's Exhibit No. 73." (This appears above at page 9.)

58 Mr. BAILEY: I ask the court to rule in connection with the sheriff's return just received in evidence, that it is not conclusive upon this defendant as to the matters therein stated.

The COURT: I will receive it, and if any effort is made to contradict it, I will then rule with respect to it.

(The sheriff's certificates and the certificate of the clerk appear above, at pages 9, 10.)

ANDREW STONE sworn.

To Mr. BARHITE:

I live in Troy and am deputy sheriff of the county of Rensselaer, and was in 1903. I executed this requisition in replevin which has been offered in evidence here. Upon that day and that time I had some talk with Edward Murphy, the defendant, and with some of the officers of the Century Mercantile Co. I talked with the Century Mercantile Co., William J. Harper and John T. Norton, counsel.

Q. What was your conversation with him?

Mr. BAILEY: I object to that as against the defendant Murphy.

The COURT: It is limited as to the company that the officer represented, and received only as against that company.

Q. State what was said by them and by you?

A. Mr. King and a gentleman by the name of Sherwood, representing John Hofman, and myself met Mr. Harper in the Church Dry Goods store. I was waiting for him and I served the papers on him and notified him that I had been around and replevied all the show cases in the building, that was in this schedule. Mr. Norton was there and there was a question about who the papers
59 should be served on. Mr. Harper spoke to Mr. Norton and Mr. Norton said, "All right," and I served them on Mr. Harper, the vice-president of the Century Mercantile Co.

They asked me if I was going to take out the goods; I told them no, I hadn't made any arrangements yet to take them out. Mr. Harper asked me not to, on account of the cases being full of stuff and it would make it very inconvenient for them. These cases at that time were all through the building, on the first floor, in the large dry goods store filled with goods.

On the 6th day of October, 1903, I had a conversation with Mr. Murphy. In the afternoon, some time in the forepart of the afternoon, I went to Mr. Murphy's office and he was out, and I came down Third street and I met Mr. Murphy coming up Third street. He was with ex-Mayor Malloy and I called him one side and I told him——

Mr. BAILEY: I object on behalf of the defendant Murphy, to any conversation had with him at this time, upon the ground that it is incompetent, irrelevant, immaterial.

Received. Exception.

I called him to one side and I told him I had some papers I wished to serve on him. I told him I had been over to the dry goods store and replevied all the cases there were in there. So he either carried the papers in his hand or put them in his pocket, and I went with him over to John T. Norton's office and we sat down there and we spoke about the cases. I told him I wasn't going to take them out, and Mr. Norton took a copy of the undertaking and he looked at it and he said to me, "Is it any good?" I said, "The sheriff has approved of it," and Mr. Murphy turned around
60 and said, "I know the firm"—it was a trust company bond, and he said he guessed the bond was all right. There was

something said about taking out the cases. I told them I wouldn't take out the cases in a day or two. They sat there for a little while considering what they would do, and they said they would probably rebond them back from me. No bond was given by them. They served on me, after that, an order restraining me from proceeding in the United States District Court.

To Mr. BAILEY:

I first saw this requisition, marked Exhibit No. 21, when it was brought to our office. I couldn't say as to the day. It was handed to me by the bookkeeper to execute. I think it was the same day. Mr. King and Mr. Sherwood were there at that time. At the sheriff's office, where I first saw the requisition. I wouldn't say for certain whether Sherwood was or not. I believe Mr. King was. Then I tok it and went over to the store. That store was open and business was being done there. It was being run at that time by Mr. Murphy, as receiver, I believe. I knew he had been appointed receiver of the Dodge Co. in order to conduct the business. I served a paper on him that day as receiver.

Q. You served this paper on him as receiver of the company?

A. I believe so.

Mr. BARHITE: I object to the question, as calling for a conclusion; that the paper shows for itself.

The COURT: Let him state just what he did.

Mr. Bailey excepted.

Q. Were you aware that the order appointing Mr. Murphy receiver, of which I show you a certified copy, had been, before
61 that time, sometime in August, 1903, served on the sheriff?

A. No, sir.

Q. You do not now recall anything of that kind?

A. No, sir.

Mr. BAILEY: In this connection I offer in evidence certified copy of the order appointing Mr. Murphy receiver of the Dodge Dry Goods Company.

Mr. BARHITE: I object to it as incompetent, immaterial and not the proper time to put in the defense.

The COURT: I will sustain the objection until you get the case. (This order appears on page 89, below.)

Mr. Bailey excepted.

I don't know who was the first person I spoke to when I went into the store, one of the men clerks; I don't know which one, whether Mr. Ryan or someone of them there. I am not positive as to who it was. I inquired for Mr. Dodge. He answered he was not in. I inquired for his brother; he was not in. Then I inquired for one of the firm, if anyone of the firm was in, that I could serve the papers on, and Mr. Harper came in the State street door. I went around and replevied the goods, notified the clerks what my business was there and checked them off, as this gentleman, Sherwood——

Q. You say you replevied the goods; I want to know just what you did?

A. I told him I had an execution in replevin. I think it was Mr. Ryan, that I came there representing the sheriff; I came there in an action of replevin, and I was going to take the goods into our possession. I told that to Mr. Ryan, or whatever clerk was there, when I would go up to a desk. Mr. Ryan said, "Don't take
62 the stuff out of the cases, or you will put the place on the bum, if you take them out." Mr. Sherwood and Mr. King were with me at the time. Mr. Sherwood pointed out each piece of goods and I checked it off on my schedule. This paper, a description of the property in the requisition, that I checked it off on. I do not know the names of anyone that was in charge of these counters other than Mr. Ryan, whom I have referred to. I had no other paper than this requisition, which is marked Exhibit 21. That is the original. I had a couple of copies. I did not make it on the copies.

Q. The receiver had in his employ there quite a number of clerks, did he not?

A. Quite a number of clerks in the building; yes, sir. I know that the Dodge Dry Goods Company had formerly occupied that store. I also understood they had gone into bankruptcy.

Q. I called your attention to Exhibit No. 21, which has marked on the back of it, "Filed November 5th, 1904;" was that certificate, which certifies that on the 6th of October, 1904, you served these papers, annexed to it, when you originally filed it?

A. I served no papers in 1904.

Q. Was the paper annexed to the execution when it was filed?

A. That is my return. I don't know when it was filed.

Paper annexed to the return marked 21A.

(This exhibit, Defendant's No. 21A, appears at page 8, above.)

I signed that which is marked 21A. I did not mail it to the clerk of Monroe county when I signed it. I turned it over in this case, to Mr. Baucus, the bookkeeper. About the day of its date, November 3, 1904, I did not turn it over to Mr. Baucus about
63 that time. I don't know when I did turn that over to Mr. Baucus.

Q. Was it before the time of its date, November 3, 1904?

A. Why, yes, I made a return on that before 1904.

Q. Where is the return you made before 1904?

A. I believe that is it.

Q. Make sure; you think that is the one which is marked 21A, before 1904?

A. Yes, sir. I am positive.

Q. This return states, "I delivered the same to the said plaintiff," speaking of these chattels; is that true, did you deliver them to the plaintiff?

A. Yes, sir.

The COURT: Did you, in fact, deliver them?

A. In 1904 they were started to be delivered to Hofman, to move them out of the building, and Evans & Co. of Syracuse, bought them.

Q. You say that this return that was made, 21A, was made by

you before 1904; now I call your attention again to this statement that it contains: "I delivered the same to the said plaintiff." Now, Mr. Stone, bearing in mind your testimony just given, that you made that return prior to 1904, I ask you is that statement true?

A. I couldn't deliver the stuff to them until 1904, that was a year afterwards, before we got our order from Judge Ray to proceed in the matter.

Q. In connection with your testimony that you made this return before 1904, is this statement that you delivered the goods to the said plaintiff contained in this return, true?

A. If they say I delivered them before 1904, I did not; I couldn't. I delivered them during the year 1904, on the 14th day of October, 1904, the very day they were taken out of the store. Matthew Heeran took them out of the store; I was there with him.

64 Q. Is it not a fact that you made this return, 21A, after you had taken these goods out of the store on the 14th day of October, 1904?

A. That return was made——

Q. You made return, 21A, after you had delivered the goods to the plaintiff; is that what you mean to say?

A. No, sir. I delivered them to plaintiff the very day I took them out of the store, and the plaintiff sold them to Evans & Son, Syracuse, that night. I did not move any of these show cases on the 6th of October, 1903. It is a fact that I did all that I did with reference to my physical connection with those show cases before I saw Mr. Harper or had any talk with him in connection with Mr. Norton, and before I saw Mr. Murphy, the receiver. I had gone through the building and they weren't there. But the show cases were there in the store and I replevied them.

Q. What do you mean by that word replevin; do you mean simply this: That you checked off each one of them, standing in front of the desk, or did you say —— of that show case —— "I replevy this?"

A. I told them what I was there for; that I was there in an action of replevin for these goods and I took them in my possession.

Q. Did you take them in your possession; did you put your hands on them?

A. Yes, sir. He walked up and pointed them out. With reference to the clerk, whoever was behind the desk, that I was there representing the sheriff in an action of replevin. My language was, "I take possession of this show case." He pointed out and I checked it off. Then I left that show case and went to the next one. Went to each one. I went in front of each show case and I put my

65 hand on it and I said, "I replevin this show case." I took it in my possession.

Q. Is that all you did?

A. I couldn't lift them. They were forty feet long and made of glass.

Mr. Bailey moved to strike out the answer as not responsive.

Denied. Exception.

Q. Did you do anything more than just what I have detailed in the questions I have asked you?

A. That is all, until I served the papers on Mr. Harper and notified him.

Q. Whereabouts did you serve those papers on Mr. Harper?

A. I was standing on the State street side and Mr. King was standing out in front on the corner of State and Third streets. I do not know which way Mr. Harper came in the building. He was just inside of the door, off State street.

Q. That was in the back hall?

A. That was right in the hall. We went in the back hall and did the talking. Mr. King said Harper was there, and I told him my business. He wanted to see Norton, and I believe he telephoned up stairs for Norton to come down. Mr. Norton came down before I served the papers. I served the papers standing right there on the floor, out in the back hall, off State street. When we talked with Norton and Harper about it people were around there, and we didn't want the people to know what the sheriff's business was there, and they asked me to step out in the back hall. The receiver was not present there at all at that time. After I had served this paper on Mr. Harper I did not go up in Mr. Norton's office at that time as I recollect. I served that paper on Mr. Harper as an officer of the defendant the Century Mercantile Company. I knew he was
65 there; I didn't know he was an employee of receiver. I didn't make any inquiry with reference to that. After I served the paper on Harper I left the building and went back to the sheriff's office, or either looked for Mr. Murphy; either one or the other. I did not take away any show cases. I did not lock any of them up. I did not take any key of the store. Mr. Harper requested me not to, or asked as a favor not to. I did not place any keeper in charge. It is a fact that I went away and left those show cases all there in use by the receiver in exactly the same physical situation that they were before I came into the store. I stated that it was after I had done all that I have described in connection with the replevying of these articles, that I saw Mr. Harper and talked with him and served him.

Q. You did not take out any insurance on these chattels, did you?

Objected to as incompetent and immaterial.

Sustained.

Mr. Bailey excepted.

—. I made an affidavit last January in connection with a motion to compel an amendment of this return, 21A. I swore to that affidavit before Mr. Farrell, who was attorney for Mr. Heeran. I believe so.

Q. Was Mr. Farrell consulted with reference to the right of the sheriff to remove these articles from that building?

Objected to as incompetent and immaterial.

Sustained.

Mr. Bailey excepted.

—. The time of day I saw Mr. Murphy was probably between one

and two, or two and three; sometime in the forepart of the
67 afternoon. I am positive with regard to that. It was along in the afternoon when I went to the office and they told me he was attending a Democratic convention in the lower part of the county. I waited for him and met him and ex-Mayor Malloy coming up Third street.

Q. Wasn't it about five o'clock in the afternoon?

A. Earlier than that, I think.

Q. Now, just what did you say to Mr. Murphy?

A. I asked him if I could speak to him a minute, and he said "Certainly," and stepped to one side. I told him I had some papers I wanted to serve on him. I told him I had been over in the morning to replevin the Hofman fixtures in the dry goods store over there. He excused himself from Mr. Malloy, I believe, and I served the papers on him and he and I went over to John T. Norton's office. I served the papers on him down in the street.

Q. Did Mr. Murphy, either at that time or in Mr. Norton's office, say anything to you about his being a receiver of the Dodge Co.?

Objected to as immaterial and incompetent.

Objection sustained.

Mr. Bailey excepted.

A. I do not remember that he said anything to me about having served upon the sheriff the order appointing him receiver. I do not recollect anything with reference to that. He did not say anything about the fact that he was using those show cases in the business he was carrying on there as receiver under the order of the court. As deputy sheriff under Heeran I did not do anything towards executing this requisition other than that which I have testified I did on October 6, 1903, until that order was vacated by Judge Ray, and then we proceeded to take the goods out. We didn't
68 do anything further for that reason until after October 11, 1904. I did not go into that store again during that period unless it was to buy something for myself. If I went in there it was simply as an individual.

Mr. Heeran went out of office as sheriff the 31st day of December, 1903, and he was succeeded by Victor M. Allen, and I was appointed a deputy and qualified under Victor M. Allen. I was present at the sale held by the trustee of these goods on October 10, 1904. I saw them sold by the trustee at that time.

Q. Do you remember going to the store where these show cases were, on October 13, 1904; to refresh your recollection I will call your attention to the fact when you met me at the State street door? Do you recollect it now? Mr. Farrell and Mr. Barhite also there?

A. Yes, I remember those gentlemen being there, but I don't remember the date.

Q. Did you go there at that time to replevy these show cases?

A. No, the show cases had been replevied a year ago.

Q. What did you go there at that time for?

A. To meet Sheriff Heeran. He was not there. I met Mr. Bailey at the door of that store, on the State street side, I believe.

Q. Do you remember that Mr. Bailey had some papers—did you know that they were injunction papers in the suit brought by the purchaser from the trustee?

A. I believe there was an injunction granted by Judge Betts, wasn't it? I was aware that an injunction had just been granted.

Q. Did Mr. Bailey say to you, "Are you a deputy from the sheriff after these Dodge fixtures?" and did you answer to that, "Yes, I will take your papers?"

A. I believe I accepted the papers. I was then given by Mr. Bailey the injunction papers of that injunction granted by Judge Betts.

69 Q. Is it not a fact that when the papers were handed to you and the order of Judge Betts shown you that you said, "This stops us?"

A. I don't believe I said that. I don't know what I said. I have no recollection as to what I said. If I said anything, I have forgotten what I did say. I think I said something. You asked me if I was deputy and I told you yes. You asked me if I accepted service for the sheriff, and I told you yes. After that order of Judge Betts was served on me I didn't do anything. I believe I gave it to Mr. Farrell, who was with Mr. Barhite, then I turned around and went away, I think. I think I left them.

Q. I show you this order and the original signature of Judge Betts, October 13, 1904; is that the paper that was served on you at that time—of which a copy was given you, and the original shown you at that time?

A. I think it is.

Q. At that time you were deputy sheriff under Victor M. Allen?

A. Yes, sir.

Q. You said nothing to Mr. Bailey at the time of the service of that order upon you, about Mr. Heeran, did you?

Objected to as incompetent and immaterial. Sustained.

Mr. Bailey excepted.

Mr. Bailey offered the order in evidence.

Mr. Barhite objected as incompetent and immaterial. Sustained.

Mr. Bailey excepted.

Paper marked "Defendant's Exhibit 68, for identification."

This was an order made by Hon. James A. Betts, Justice Supreme Court, October 13, 1904, in an action brought in that court,

70 venue in the county of Rensselaer, by William Murphy against Victor M. Allen, as sheriff of the county of Rensselaer. After the recitals the order reads as follows.

"Ordered, that until the further order of this court, the defendant, "his agents, attorneys and servants be, and they hereby are, en- "joined and restrained from executing as against the chattels here- "inafter mentioned, any requisition in replevin issued in the action "above referred to brought by John Hofman Co., and he, and they, "are hereby enjoined and restrained from interfering in any man- "ner with the plaintiff in his possession and enjoyment of the fol-

"lowing described property, to wit:" (There follows the same description that is in the complaint in this action.)

Q. When you came around to the store on the 13th of October, 1904, did you have this requisition, Exhibit 21, in your pocket?

Objected to as incompetent and immaterial. Sustained.
Mr. Bailey excepted.

Q. After this order of October 13, 1904, was served on you, did you give this requisition, Exhibit 21, to Matthew A. Heeran?

Objected to as incompetent and immaterial. Sustained.
Mr. Bailey excepted.

—. I did not pay any storage charges on this property from October 6, 1903, down to October 13, 1904, nor did the sheriff, nor did Heeran, that I know of. So far as I know there was no agreement with anyone during that time for storage charges.

71 To Mr. NORTON:

Before I received these papers in October, 1903, I don't believe I ever heard of the Century Mercantile Company. I did not know where its office was. I did not know anyone who was connected with it. When I called at the store, in the Dodge building, I found the dry goods business in progress. There was a sign over the doors, "Bankruptcy Sale," and there was such sale in progress there, as I observed. I afterwards learned who the officers of the Century Mercantile Co. were, from Mr. Harper. It was either from him or you I learned. I couldn't remember all the conversation.

Q. At the time when you first encountered me you had not found Mr. Harper, had you? Is it not a fact that I hunted up Mr. Harper for you?

A. I believe it might be so; I can't remember. Whatever service I made upon Mr. Harper as an officer of the Century Mercantile Co. was made outside of this store and in the hallway where the elevators go up to the office. It was right outside the door, I believe. This dry goods business was conducted in a store which was connected with an elevator inside and a stairway running up three flights, and a basement underneath. In the rear of this store, while there was a door that came into the store, it was, nevertheless, an open entrance to the offices that were in the building above the part occupied by the dry goods business. And among others you had an office in that portion of that building. And there were other lawyers who had offices there and other kinds of business, and all above the third floor was occupied for some other business than the dry goods business down stairs.

Q. You did not find any officer of the Century Mercantile
72 Co. in any kind of possession of the business that was being conducted in that bankrupt sale down stairs, did you? You did not understand that the Century Mercantile Co. was conducting that bankrupt sale, did you?

A. I didn't know who was conducting it. I did not know whether the Century Mercantile Co. was conducting it. The store was open

and they were doing business there. But I couldn't say, and I cannot say now as to whether or not the Century Mercantile Co. was conducting the business of that bankrupt sale. I didn't know at that time. I couldn't say whether the Century Mercantile Co. or some one else was selling out the goods there; I couldn't say as to that. I didn't know it was the Century Mercantile Co. at the time I served these papers. I have never known it since.

Q. All the information you ever had upon the subject was, that it was being conducted by Mr. Murphy as receiver of the dry goods company?

A. They were selling out stuff there. They weren't selling the fixtures; but the goods and the stuff in the cases. I do not know what business the Century Mercantile Co. was engaged in. I do not know whether or not they were ever engaged in any such business as the dry goods business. I never knew there was ever any such company until I had the papers to serve, and went to the offices of the concern.

Q. You never knew whether the Century Mercantile Co. was in possession of any of this property or not, did you?

A. Not until after I served the papers on Mr. Harper, or until I went to serve the papers on Mr. Harper.

Q. Did you find out then that the Century Mercantile Co. was in possession of these fixtures that you went there to replevin?

A. Only from his conversation.

73 Q. Did you find that out then.

A. Well, I found out he asked me not to take the stuff out of there, as vice-president of the Century Mercantile Co.

Q. He asked, as vice-president of the Century Mercantile Co., not to take the stuff out of there, did he?

A. The show cases.

Q. Did he tell you why he did not, as vice-president of the Century Mercantile Co., want that stuff taken out?

A. Oh, I won't say that he asked me as vice-president.

Q. You know that he was in the employ of the receiver, working as a clerk in that store, didn't you?

A. He was there; I didn't know who he was working for. I did not know that the Century Mercantile Co. was conducting any business there. I did not even know where its office was. I did not know where its place of business was located, only from the direction of those papers, from the replevin papers. There was not anything in the papers to tell me where the Century Mercantile Co. was doing business, as I remember. Those were the instructions we got, that Mr. Dodge was president and Mr. Harper was vice-president of the Century Mercantile Co. I believe we got that in a letter. I don't know as there was anything in them to tell you what the character of the business was that the Century Mercantile Co. was engaged in.

Q. Did you ever learn that the Century Mercantile Co. had anything to do with the conduct of the business that was being done down stairs, when you made this pretended levy?

A. Yes, I understood that they and the Dodge Dry Goods Co. was

one. I got that information, I believe, from Mr. Harper; not that the Century Mercantile Co. and the Dodge Dry Goods Co. were one, but that they succeeded the Dodge Dry Goods Co. or some-
74 thing like that. I don't know as I ever heard that the Dodge Dry Goods Co. was a tenant in the building of the Century Mercantile Co., and that the Century Mercantile Co. was simply a building organization. I didn't know. It was a pretty well mixed up affair.

Q. Are you able to say whether or not the Century Mercantile Co. was in possession of these cases of goods on the 6th of October, 1903?

A. I don't know who you would call in possession. It was in the Century Mercantile Co.'s building.

Q. It was in the building owned by the Century Mercantile Co.; is that the only possession you attribute to that company, the fact that these fixtures were in the building that that company owned?

A. Well, the vice-president of the Century Mercantile Co. asked me not to take that stuff out of there.

Q. Is that all?

A. I believe so. I knew that the Dodge Dry Goods Co. had been in business for some time in the city of Troy, from the time that the building was constructed, occupying three floors of the building and a basement. And the Dodge Dry Goods Co. went into the hands of a receiver in bankruptcy; I remember that. And then there was a receiver's sale in that store. There was no intermission between the time when the Dodge Dry Goods Co. went into the hands of a receiver and the selling out of the stuff, not that I know of.

Q. And that condition of the receiver having his bankruptcy sale continued until the 6th of October, 1903, when you went there, didn't it?

A. I understood the place was in the hands of a receiver; yes sir.

To Mr. BAILEY:

Q. You knew that the receiver was Mr. Murphy?

A. I had read in the papers that Mr. Murphy had been appointed receiver.

75 To Mr. BARHITE:

Q. You referred to Mr. Ryan with whom you had some talk there first; who is Mr. Ryan?

A. He was one of the clerks in the Dodge Dry Goods Co. store. He had been there for some time. He has been there as long as the Dodge Dry Goods Co. has been in business, I believe. This requisition in replevin was handed to me by some one in the sheriff's office. When I go through with the papers I handed them back to the sheriff's office. I took them back to the clerk.

Q. Do you know where these returns are made out, who actually made them out?

A. Sometimes the clerk makes the return out for me, and sometimes the attorney that I do business for makes them out. You did not make any return for me.

Q. Do you know who actually drew up that return?

Mr. Bailey objected, as immaterial.
Received. Exception.

A. I think Mr. Farrell drew that up. I did not notice when I signed that, the date, that it was 1904. After I replevied those goods and I had the conversation with Mr. Harper in which he asked me not to take them out, and also the conversation with Mr. Murphy a short time after that, an order from the bankrupt court restraining us from further interference was served upon our office, through the sheriff or under sheriff. My attention was called to the matter. That was in a few days after we had taken possession of those goods.

Mr. BARHITE: I offer that order in evidence.

76 Mr. NORTON: I object, on behalf of my client, as incompetent and immaterial.

Received.
Mr. Norton excepted.
Marked Exhibit 22.

"At a Stated Term of the District Court for the Northern District of "New York, Held in Auburn, N. Y., on the 9th Day of October, "1903.

"Present: Hon. George W. Ray, Judge.

"In the Matter of DODGE DRY GOODS COMPANY, an Alleged Bankrupt.

"Upon the petition of Edward Murphy, 2d, receiver herein and "upon all the proceedings heretofore had in this matter, and on the "application of H. D. Bailey, attorney for the said receiver,

"Ordered, that all proceedings in the action heretofore brought "in the Supreme Court of the State of New York, venue in the "county of Monroe, by John Hofman Company against Edward "Murphy, 2d, and the Century Mercantile Company, summons "served upon Edward Murphy, 2d, October 6, 1903, for the recovery "of certain personal property, then in the possession of said Edward "Murphy, 2d, as receiver herein, be, and hereby are restrained and "enjoined until the further order of this court, in the premises, and "it is

"Further ordered, that all persons, firms and corporations be and "they and each of them are hereby enjoined and restrained

77 "from in any manner interfering with any of the property "now in the possession of Edward Murphy, 2d, as receiver "herein, or that came into his possession upon his appointment and "qualification as such receiver by a suit or proceeding in any court "or otherwise until the further order of this court in the premises; "and it is

"Further ordered, that the sheriff of the county of Rensselaer be "and hereby is enjoined and restrained from executing any requisi-

"tion in replevin or any writ of attachment against or upon any of "the property now in the possession of Edward Murphy, 2d, as re- "ceiver of the Dodge Dry Goods Company, and from in any manner "interfering with the said receiver in the possession of any of the "goods and property now in his possession, as such receiver, at the "store and premises occupied by the said Edward Murphy, 2d, as "such receiver, on the southwest corner of Third and State streets in "the city of Troy, N. Y., and particularly that described in these "papers in such action until the further order of the court in the "premises.

"GEO. W. RAY,
"*United States Judge.*"

Mr BARHITE: I offer in evidence the order vacating that injunction.

Mr. BAILEY: I object to the order which counsel now offers in evidence, upon the following grounds: That it was not made until after the United States Court had caused to be sold and delivered these very chattels to which it purports to refer; that the order as now presented does not recite, nor purport to be an order in refer-
78 ence to Edward Murphy, 2d, as receiver, but rather refers to Mr. Murphy individually; that the United States Court never had jurisdiction to make the order; that the papers which are recited in the order conferred no jurisdiction upon the United States Court to make any order with reference to Mr. Murphy individually. I offer in support of my objection these papers which are recited in that order, showing that the court had no jurisdiction, for the reasons I have stated. Also, that the paper presented is now authenticated in the manner entitled to receive it in evidence. I want to offer in evidence the papers I have referred to, showing the absolute want of jurisdiction of the court to make the order.

Mr. BARHITE: I object to his making any offers of his papers now, at this time.

The COURT: I will receive the order in evidence.

Order marked Exhibit 23.

(This was the order which plaintiff concedes to have been made October 11, 1904, and which was entered October 18, 1904, in the office of the clerk of the United States Court. The order reads as follows:)

79 "At a Special Term of the District Court of the United States, "Held at the Court House, in the City of Utica, New York, "on the 1st day of December, 1903.

"Present: Hon. George W. Ray, District Judge.

"In the Matter of the DODGE DRY GOODS COMPANY, an Alleged Bankrupt.

"A motion having been duly made at the above-named term of "court upon the petition of the John Hofman Company for an

"order vacating and annuling an injunction order heretofore "granted by this court on the 9th day of October, 1903, which said "injunction restrains and enjoins all proceedings in an action "brought in the Supreme Court of the State of New York, in "which the John Hofman Company, is plaintiff, and Edward Mur-"phy, 2d, and the Century Mercantile Company, are defendants.

"Now, after hearing John A. Barhite, of counsel for said John "Hofman Company, in favor of said motion, who reads his own "affidavit verified the 31st day of October, 1903, the affidavit of "John M. Sherwood, verified the 31st day of October, 1903, the "several affidavits of John Hofman, and after hearing H. D. Bailey,
"Esq., of attorney for Edward Murphy, 2d, who reads the affidavits
"of James E. Dodge and of Edward Murphy, 2d, in opposi-
80 "tion thereto, and after hearing John T. Norton, Esq., of
"counsel for defendant, the Century Mercantile Company, "and due deliberation having been had thereupon, it is ordered, "that the injunction order heretofore granted in the above-entitled "matter by this court on the 9th day of October, 1903, be, and the "same is, hereby vacated and annulled so far as said order restrains "or interferes with any proceedings in an action in the Supreme "Court of the State of New York, in which John Hofman Company "is plaintiff and Edward Murphy, 2d, and the Century Mercantile "Company are defendants, and so far as said order in any manner "interferes with the prosecution of said action.

"GEO. W. RAY,
"U. S. Judge."

Mr. Bailey excepted.

Mr. BAILEY: I offer in evidence affidavit of Mr. Barhite, verified October 31, 1903, and marked defendant's Exhibit No. 11, for identification. Also affidavit of John Hofman, verified October 31, 1903, marked defendant's Exhibit No. 12, for identification. Also affidavit of John N. Sherwood, verified October 31, 1903, marked defendant's Exhibit No. 13, for identification. Also, notice of motion for November 10, 1903, signed by Mr. Barhite, marked defendant's Exhibit 14, for identification. Also affidavit of Mr. Hofman dated November 23, 1903, marked defendant's Exhibit 17, for identification. Also affidavit of the receiver, made November 4, 1903, marked defendant's Exhibit 18, for identification. Also order made November 10, 1903, with a notice signed by Mr. Barhite indorsed on, marked defendant's Exhibit 19, for identification. Also,
81 notice served by the receiver pursuant to t' order of November 10, 1903, and judgment in the judgment-roll of Murphy, as trustee, against the Century Mercantile Co., marked defendant's Exhibit 28, for identification. Also inventory of the property recovered in that action, marked defendant's Exhibit 29, for identification. Also, order for sale, made by the Federal Court, September 7, 1904, marked defendant's Exhibit No. 30, for identification. Also, order for that sale of October 10, 1904, and report of the sale had on October 10, 1904, marked defendant's Exhibit 32, for identification. Also, report of the sale, marked defendant's Ex-

hibit 34, for identification. Also, order confirming the sale, marked defendant's Exhibit 35, for identification.

Papers objected to by Barhite.

Sustained.

Mr. BAILEY: I except severally to the ruling as to each of them. Defendant's Exhibit No. 11, for identification, is an affidavit made by Mr. Barhite October 31, 1903, for use on motion to vacate the order of October 9, 1903.

Defendant's Exhibit No. 12, for identification, is an affidavit, verified October 31, 1903, made for use on same motion as last affidavit. In this affidavit, among other things, John Hofman says, that he is president of the plaintiff, and, speaking of said show cases, says "and if allowed to remain in the hands of Mr. Murphy, the re-
" ceiver, will be subject to great deterioration in value," and also said the show cases belonged to John Hofman Co.

82 Defendant's Exhibit No. 13, for identification, is an affidavit made by John M. Sherwood, verified October 31, 1903, for use on the same motion.

Defendant's Exhibit No. 14, for identification, is as follows:

" United States District Court, Northern District of New York.

" In the Matter of DODGE DRY GOODS COMPANY, an Alleged Bankrupt.

" To H. D. Bailey, Esq., Attorney for Edward Murphy, 2d, receiver, etc.:

" Please take notice, that upon the annexed affidavits of John N. " Sherwood, John Hofman and John A. Barhite, each verified on " the 31st day of October, 1903, and upon all proceedings had " in an action in the Supreme Court, in which said John Hofman " Company is plaintiff and Edward Murphy 2nd and another are " defendants, and upon all proceedings had in the above entitled " proceeding, a motion will be duly made at a term of the District " Court of the United States for the Northern District of New York, " to be held at the Court House in the City of Utica on the 10th day " of November, 1903, at the opening of Court on that day or as soon " thereafter as counsel can be heard, for an order vacating and " setting aside the injunction order in the above entitled proceeding,
" heretofore granted on the 9th day of October, 1903, pre-
83 " venting the prosecution of said action in the State Court
" of the State of New York, and for such other or further " relief as may be proper and just.

" Yours, etc.,

" JOHN A. BARHITE,

"Attorney for John Hofman Company, 48-86 German Insurance Co. Building, Rochester, N. Y."

Defendant's Exhibit No. 17, for identification, is an affidavit verified by John Hofman, president of the plaintiff, and in setting forth a letter written by James E. Dodge, under date of June 16,

1903, which is plaintiff's Exhibit No. 17, in this action, the last line is quoted as follows: "We refuse to accept your cases and work."

Defendant's Exhibit No. 18, for identification, is an affidavit made by the receiver, verified November 4, 1903, and recited in order offered by plaintiff, Exhibit 23.

Defendant's Exhibit No. 19, for identification, was an order made on the application of this plaintiff in the U. S. District Court on November 10, 1903, drawn and entered by Mr. Barhite and recites the appearance of Edward Murphy, 2d, as receiver, in the Federal Court, and directs that the hearing of the motion made by John Hofman Co. to vacate the order of October 9, 1903, be continued to December 1, 1903, and directs, "Edward Murphy, as receiver, to serve certain notices in the meantime.

This order does not show any appearance by Edward Murphy, 2d, individually. Endorsed thereon is a notice of its entry,
84 signed by John A. Barhite, attorney for John Hofman Co. In this connection was also the notice served by the receiver pursuant to this order.

The judgment-roll, defendant's Exhibit No. 28, for identification, appears below.

Defendant's Exhibit No. 29, for identification, included the property which is described in the complaint.

Defendant's Exhibit No. 30, for identification, directs the sale of certain property, including specifically that mentioned in the complaint, unless cause to the contrary be shown on a hearing to be had October 10, 1904, in the Federal Court.

Defendant's Exhibit No. 32, for identification, was an order made October 10, 1904, reciting that no cause was shown against the sale of the property, nor any objection made thereto, and reciting the service of notice and directing the sale.

Defendant's Exhibit No. 34, for identification, shows the sale by the trustee, pursuant to the above orders, of the property which is described in the complaint.

Defendant's exhibit No. 35, for identification, shows the report of the sale of the property described in the complaint by the trustee, and is an order approving that sale, and directing conveyance of same.

Mr. BARHITE: I offer in evidence order made at Special Term, permitting the amending of the return in this action.

Mr. BAILEY: I object to it, as incompetent and irrelevant.

Received. Exception. Exhibit 24.

85 Defendant's Exhibit No. 24 was an order made January 28, 1905, on notice to defendants, who appeared.

"Ordered, That said Matthew A. Heeran, late Sheriff of Rensse-
"laer county, be and he is hereby directed and permitted to file an
"amended return as of the date of his original return, namely, No-
"vember 3, 1904, with the correct date, October 6, 1903, inserted in-
"stead of the date, October 6, 1904, as the date when the papers in
"this action were served upon the defendants, and when the prop-
"erty described in said papers was taken from the defendants by
"said sheriff.

"JAMES L. HOTCHKISS, *Clerk.*

The endorsement on said order says that the same was entered in Monroe County Clerk's office on the 16th day of February, 1905.

To Mr. BARHITE:

I have no interest in this action. All I did I simply did in the line of my official duties as deputy sheriff. Some of these show cases were thirty or forty feet long, both sides glass and the top glass. All of them were too heavy for me to carry away at that time. I wouldn't dare undertake to try to take them down to remove them. They were loaded with goods.

I saw Mr. Harper and he, or Mr. Norton, told me that he was vice-president of the Century Mercantile Co., and he requested me not to take the goods away. I didn't know, at that time, that he had any connection with Mr. Murphy.

I said, "I can't take them out right away; I have got to
86 "make preparations to find storage and get people to take "them down, with teams and the like of that." Mr. Harper said, "We don't want them taken out. You leave the goods here; "they will be perfectly safe in our hands. We have a watchman "here," or something to that effect. "It will be just the same as if "you had them right in your own possession."

I was present at the sale when the trustee in bankruptcy, Mr. Murphy, attempted to sell these show cases.

Q. At that sale did you give notice of the sheriff's rights?

Mr. BAILEY: I object to it as incompetent, as against the defendant Murphy.

Received. Exception.

A. I was there and forbade the sale of them. I told them that they were replevied, and they were in the possession of the sheriff, that the sheriff had replevied the goods. Mr. Murphy was present.

Q. Did anyone ask him whether he, as trustee, could guarantee the title of those goods or not, as trustee?

Mr. BAILEY: I object as incompetent and irrelevant.

Received. Exception.

A. They wouldn't guarantee the title. It was either Mr. Murphy or Mr. Bailey, as his attorney, notified whoever bought them that they wouldn't guarantee the title, or wouldn't defend the action that was brought in the matter, as to those goods. At that time Mr. Murphy was trustee in these bankruptcy proceedings. I couldn't say whether William E. Murphy, brother of defendant, did buy them or who it was that bought them.

87 To Mr. BAILEY:

At the time the trustee sold this property Mr. Heeran had no keys to the building; he did not have possession of the building or any part of it. He had possession of the cases that were in it, and had no means of access to the building by means of keys. The trustee, Mr. Murphy, had those, so far as I know.

To Mr. BARHITE:

I had no claim to any part of the property in that building, except the show cases.

J. IRVING BAUCUS sworn.

To Mr. BARHITE:

I am under sheriff of the county of Rensselaer, and was in 1903. In 1903 I was not under sheriff, I was civil deupty. I remember when these papers in replevin were received. They were not sent, they came there with them. I delivered them to Mr. Stone for service. I had a talk with Mr. Murphy about those goods. After the replevin was made, in the afternoon he telephoned to me and wanted me not to move the goods. He asked me when we were going to move them. I said we would move them as quick as we could get facilities for moving them. He said, "For God's sake," not to move them until he could have a chance to rebond or get some kind of an order stopping us. I told him we probably couldn't move them the next day, we did not know how to move those large cases. He went on to state about this order. There was an order served, when the receiver was appointed, restraining the sheriff from interfering with the Dodge Company's property. We told him we didn't un-
88 derstand that was the Dodge Company's property, that it didn't belong to the receiver, it belonged to Hofman under replevin. He said he would be down to see me, and he came down the next morning to see me. My conversation then was about the same thing.

He did not say anything about the Century Mercantile Co. claiming the property at that time. He only told me we were restrained by Judge Ray, of the United States Court, from touching that property at all, by the order served upon us. I did not have any talk with Mr. Harper or anybody representing the Century Mercantile Company.

To Mr. BAILEY:

I made an affidavit in this matter sometime in January, 1905. That was drawn by my attorney, Mr. Farrell. In that affidavit I say, "That he is a deputy sheriff under Victor M. Allen, of the "county of Rensselaer, and has charge of the civil business." I was under sheriff under Allen, and have been since Allen was appointed. He says he is deputy sheriff and under sheriff under Victor M. Allen.

Q. Were you both deputy sheriff and under sheriff?

A. I don't know. I suppose so. I took his word for it. He understands more about those phrases of law than I do. I know about that injunction order of the United States Court that appointed Mr. Murphy receiver. The one that was served on us in August, 1903, about the time of his appointment. (Paper shown witness.) I think that is the one.

Mr. BAILEY: I offer the order in evidence.

Mr. BARHITE: I object to it as incompetent and immaterial.

89 Mr. BAILEY: It is the order that the witness refers to in his direct examination, and I offer it in evidence. It is the order appointing Mr. Murphy receiver, served on the sheriff, which he has referred to as mentioned to him by Mr. Murphy, at the time he claims to have made this levy.

Sustained.

Mr. Bailey excepted.

Paper marked Defendant's Exhibit No. 2, for identification, which is as follows, in its material parts: An order made in the United States District Court August 18, 1903, George W. Ray, justice, in the matter of Dodge Dry Goods Company, an alleged bankrupt. Recites filing of petition and affidavit, and directs the alleged bankrupt to show cause at Auburn on the 6th of October, 1903, why a permanent receiver should not be appointed.

"It is hereby ordered, that pending the return of this order * * * said alleged bankrupt be, and it hereby is, enjoined and restrained "from making any transfer of any of its property and * * * all "persons are enjoined and restrained from instituting and from pros- "ecuting any and all suits and proceedings in any court against said "alleged bankrupt and against any of its property. * * * Or- "dered, that Edward Murphy, 2d, of Troy, N. Y., be, and he hereby "is, appointed temporary receiver of all the property, real and per- "sonal, and rights of action and demands due said alleged bankrupt "with power to collect and receive same and continue the business "with the present employes." Directs him to file a bond of $200,- 000, and petitioners to file a bond of $500. And continues: "And on

"the filing of such bonds approved by the said referee, with

90 "the clerk of this court, said receiver shall take immediate

"possession of all said property of said alleged bankrupt, and "in carrying on and continuing the business may pay employees, in- "sure the stock and arrange for the continuation of the lease of the "premises, where the business is carried on, * * * and on fil- "ing bonds, such temporary receiver is hereby vested with all the "usual powers of a receiver."

Mr. BAILEY: Upon examination of Plaintiff's Exhibit No. 23 I find that it is unsigned and uncertified.

The COURT: I sustain the objection to that order, unless it appears to have been proved by proper authentication.

Mr. BAILEY: If you will admit it was made October eleventh, and not entered until October 18, 1904, I will waive my objection to it, upon the score of authentication.

Mr. BARHITE: I will admit that.

To Mr. BAILEY:

Now, this order marked Defendant's Exhibit 2, for identification, was served on me along in August, 1903, I think. I can't fix any date. It was about the time that Mr. Murphy took possession there of the Dodge property, as receiver, I think.

Q. Did you have any consultation with Mr. Farrell, the attorney

for Mr. Heeran, and your attorney as to whether it would be safe for the sheriff to replevy this stuff and take it out, or not?

Mr. Barhite objected as incompetent and immaterial.
Sustained. Exception.

I say, in my affidavit, to which you have called my atten-
91 tion, that Mr. Farrell said, among other things, "It would "be better to take formal possession of the property and let it "remain in the building for a short time." That is right in a certain sense. It means all right there, but there were other reasons besides that. We couldn't move that stuff in the glass cases. We had to get people to move them. There were counters running the whole length of the building. When we did move them, we sent to Rochester and got people to move them for us. We couldn't move them. We had to leave them there until we could get teams and storage and facilities to move them.

Q. Was the reason you have just given [illegible] only one why you did not take out the cases, or take actual possession of them for over a year?

A. That is not the only one, because I have given two or three. I suppose I knew, at that time, in October, 1903, that the receiver was carrying on the business of the Dodge Dry Goods Co. I knew there was a bankrupt sale there. I saw it on the door there. I say I talked with Mr. Murphy on October 6th, over the telephone. He so stated himself; that is all I know about it. He came down the next morning to talk with me about it. I say, in my direct examination, that he called my attention to that order which was served on me before that time. He tried to make us stop on that without any further proceedings. He told me he thought that would restrain us from touching that stuff and we did not think so.

Q. Did he tell you that he should make further application, as receiver, to Judge Ray with reference to it?

A. He said if we wanted another one he would get it, or he would re-bond. Mr. Murphy said something to me about re-bonding at
that time, that morning he was there talking with me on the
92 7th of October. He said he would either re-bond or do something, he would be responsible for the stuff, and he didn't want us to take it. He said he would either re-bond or do something. He said he would be responsible for the stuff, or the cases, and I needn't worry about that. He said they were in his possession and he was a receiver, and there couldn't anybody get them only himself. He told me he was receiver and that he had possession as receiver. He claimed them as temporary receiver. He did not tell me at that time that he was responsible to the creditors for that property, and that he wasn't going to let it go without a direction of the court. He never told me he wouldn't let it go without the direction of the court. He said he would apply for further orders restraining us. He afterwards served me, or some officer, with an order made on the 9th of October. I had no receipt from Mr. Murphy in any capacity, for that stuff. I did not have any receipt from anybody for that stuff.

Q. You did not pay any storage charges on it from October 6, 1903, down to October 13, 1904, did you?

A. Yes, sir; we paid storage. A. I don 'know exactly what day we replevied that. I got a letter from Judge Ray vacating the order, and I think the day after the trustee sold the stuff, and in a few days more we took the stuff out.

Q. I show you that paper, your affidavit, and the order fixing the fees; look at that and see if it will refresh your recollection as to storage charges, and when you paid them?

A. These charges in here are correct. I can't tell you exactly the day we paid them. We hired store room when we took the cases. The date, I have it there. A. October 14, 1904, paid storage. That is the only storage that I paid. And I paid that after the property was taken out by Mr. Heeran, on the 14th of October, 1904. And for storage that was done subsequently to that time, done the
93 day before. They were only in storage for a little while, and that was all he charged. We put them in there when we took them out, and that was the 14th of October, and we paid no storage for any time prior to that.

Q. Mr. Barhite swears in his affidavit that he made on this motion to change the venue as follows: "Instructions were given to the sheriff of Rensselaer to take actual possession of said goods under said writ of replevin in October, 1904;" is that true?

A. I don't remember. I just stated in my direct-examination that I heard that Judge Ray had done something with reference to an injunction order. I didn't hear it. It came in an order to us that the injunction was vacated, if I remember right. I got the letter. We went in with the other sheriff and he has had the papers for more than a year. I have not got the letter here. I had a telegram on the 11th of October, instead of a letter. I got a telegram. I haven't seen the papers in a year, and I don't know just how these papers come to us. They have gone into the other sheriff's hands, and I have no access to them. A. I suppose that telegram was addressed to the sheriff, to Matthew Heeran. He didn't know any other sheriff he had done business with. Matthew A. Heeran was not sheriff at that time. The telegram was from Mr. Barhite, I think. I can't recollect what it was. I think he had a talk there. Just what was in it I can't tell you. The substance of it was that the order was vacated.

Q. Any directions as to what you were to do?

A. I don't remember. I have no recollection on that subject.

Q. When Mr. Barhite says that he gave you instructions to take actual possession, you don't know whether that is correct, or not?

94 A. I don't know about that. I don't remember that. He came on himself. A. Why, I think we have the telegram, unless it has been mislaid. I think Mr. Farrell had it. I will produce it here, if I can find it.

Q. You can telephone or telegraph for it, and have those papers here by Wednesday morning?

A. I don't know whether I can or not. I think it is in Mr. Farrell's possession. He is in Troy.

Mr. BAILEY: I call upon this witness, and ask the court to instruct him, to produce these communications, the telegrams, or what other communications he has received from Mr. Barhite or the plaintiff. I ask for an order, upon the evidence already given, requiring him to produce them.

The COURT: I cannot give any such order as that.

After Mr. Stone made his report to me, of what he had done on October 6, 1903, I did nothing more with reference to these show cases while Mr. Heeran remained in office, just kept watch of them is all. I mean by keeping watch of them, seeing that they were not taken out of there; seeing they were kept; look in there once in a while to see if they were there. To see if everything was all right; certainly that was all I did. I didn't take them out. I recollect on October 11, 1904, after I received from Mr. Barhite instructions to go ahead and seize these chattels that I called up Mr. Bailey on the telephone. I did not say to him then that I had heard that the United States injunction was modified, and that I was going ahead to replevy that stuff. I said I was going to take it out.

Q. Do you recollect that Mr. Bailey asked you who was
95 talking when you first called on the telephone?

A. I don't remember all the conversation; he might have said so.

Q. Do you recollect what you answered when the inquiry was made?

A. Probably that was the purport.

Q. Didn't you say, in answer to me, as to who it was talking, that it was Mr. Baucus of the sheriff's office?

A. Well, probably. I don't recollect that Mr. Bailey asked me to come to the court when Judge Betts was holding court, so he could make application to Judge Betts with reference to the matter.

Q. Do you recollect telling Mr. Bailey that he would have to consult with Mr. Farrell, that he had charge of it?

A. Probably.

Q. You do think you did that?

A. I think, to consult with my attorney. He was our attorney, of course. I would rather he would talk with him. I do not remember telling Mr. Bailey that. I knew at that time that the chattels were sold on the day before, October tenth.

Q. Did you know that Mr. Bailey met Mr. Farrell at the court house that morning or that day?

A. I don't remember anything about that.

Q. Did you have any communciation from Mr. Farrell to that effect, that an order was made by Mr. Justice Betts?

A. I think the order was served on me—I think so.

Q. That day?

A. Well, yes; that we were held up, restrained.

Q. Do you recollect that the first order that was made by Judge

Betts was made returnable at half-past two in the afternoon of that same day?

A. I don't remember any order like that.

Q. Did you go to court on the eleventh with Mr. Farrell, before Betts?

96 A. I can't distinguish the days apart. I went down to court when an application was made; I know that.

Q. Do you remember Mr. Farrell stating that he appeared for the sheriff of Rensselaer county, applied to the court at half past two on the return of the first order, to show cause, for an adjournment till the thirteenth, which was Thursday?

A. I don't recollect that.

Q. I show you a paper and ask you if that is not the order that was served on you, and if you were present in court when that was made?

A. I don't think I was in there when that was made. I was in there when the order was heard.

Q. See if that was the first order that was served on you?

A. I can't tell you all about those orders, because Mr. Farrell, at that time, was directing it more than we were, because we were connected with the other sheriff's office, and we didn't want much to do with this. That paper was served on me; I know that.

Mr. BAILEY: I offer that order in evidence.

Mr. BARHITE: I object to it as immaterial and irrelevant. The plaintiff was not a party to these proceedings in any shape or manner. No papers were served upon him.

The COURT: I do not see the materiality of it.

Mr. Bailey excepted.

The paper was marked Defendant's Exhibit 77, for identification.

The Defendant's Exhibit No. 77, for identification, was an order of this court in this action made at Special Term in Troy, N. Y., October 11, 1904, recites an order to show cause previously issued, returnable at that time, and recites the appearance of William

97 E. Murphy by H. D. Bailey, his attorney, and the appearance of the sheriff of the county of Rensselaer by James Farrell, his attorney, and that the sheriff asked an adjournment; and orders an adjournment to October 13, 1904, and in the meantime restrains the sheriff from interfering with the property, which is described in the complaint.

Q. Is it not a fact that the obedience to this order I have just shown, and the order to show cause referred to in it, you did not do anything further towards taking out these chattels while that order remained in force?

A. Of course we didn't. How could we? We were restrained by the judge.

Q. Do you recollect being in court before Justice Betts on the 13th of October, with Mr. Farrell?

A. Yes, sir.

Q. Mr. Barhite was also there?

A. Yes, sir. I recollect that an order was made that day vacating this stay that had been granted in the order of October eleventh.

Q. I show you a copy of that order served upon me by Mr. Farrell, your attorney, and ask you if that is the order made that day?

A. I don't think I know anything about this order. I don't think this order was served on me.

Q. Look and see if that sets forth what was done on the thirteenth?

A. I can't tell you anything about this thing.

Paper marked Defendant's Exhibit No. 72, for identification. Defendant's Exhibit No. 72, for identification, was an order made at Special Term of this court at Troy, N. Y., on October 13, 1904, in this action. Recites the appearance of James Farrell on behalf of the sheriff of Rensselaer county and objection to the consid-
98 eration of the motion made in the order to show cause on the ground that the motion could not be made in the judicial district, and, on motion of James Farrell, attorney for said sheriff, vacates the stay theretofore granted in the order of October 11, 1904.

Q. Do you recollect on that same 13th day of October an application was made to Mr. Justice Betts, in court, by William E. Murphy, the purchaser of these goods, in an action brought by him against Victor M. Allen, for an injunction?

Objected to as incompetent and immaterial. Sustained. Exception.

Q. Is it not a fact that nothing was done in or about that store towards taking out these goods until about five o'clock on the following day, Friday, the 14th of October?

A. I didn't have anything to do with it at that time. Mr. Heeran had it in his own hands. I was not present when they were taken out.

Q. When you were in court on the 13th of October, 1904, did you have this requisition marked Exhibit 21, in your possession?

Objected to as incompetent and immaterial. Sustained. Exception.

Q. Subsequent to October 11, 1904, did you hand this requisition, Exhibit 21 of the plaintiff's, to Mr. Heeran himself.

Objected to as incompetent and immaterial. Sustained. Exception.

Q. Now, in these various conversations that took place between you and Mr. Bailey, attorney for William E. Murphy, on the eleventh and thirteenth of October, and in that interval, did you say anything to Mr. Bailey about Mr. Heeran?

99 Objected to, as incompetent and immaterial. Sustained. Exception.

Q. Or that you were acting for Mr. Heeran in the premises?

Objected to as before. Sustained. Exception.

Q. I show you this paper, and I ask you if it is a statement of the sheriff's fees, as verified by you in this action?

A. Yes, sir.

Paper marked defendant's Exhibit No. 70, for identification.

(Defendant's Exhibit No. 70, for identification, is as follows:)

"TROY, N. Y., *October* 15, 1904.

"The John Hofman Company, to Matthew A. Heeran, Dr.

"1903.

"October 6th.	To serving summons on two defendants "in the action of John Hofman Com- "pany against Edward Murphy and "The Century Mercantile Company..	$2.00
"October 6th.	To executing requisition in replevin....	1.00
"November 2d.	To serving notice of motion.....	1.00
	"1904.	
"October 14th.	Paid for storage of show cases.....	5.00
"October 14th.	Paid for sandwiches and coffee for work- "men	3.25
	"Sheriff's fees and allowance.....	68.50
100	"Paid James Farrell, special counsel, for services "and advice in this matter.....	$150.00
		"$230.75"

Q. Have you here any of that correspondence between Mr. Barhite and yourself that I asked you for on Monday?

A. No, sir.

Q. Have you made any effort to obtain it?

A. No, sir.

Mr. BAILEY: I ask you for the communication that you received for the sheriff of Rensselaer county on the 11th day of October, 1903.

A. I have not got it.

Q. You have stated that you had certain conversations with Mr. Murphy; tell us when the first one was?

A. I told you on the afternoon of the replevin, through the telephone, and the next morning he came down there personally.

Q. You said something about Mr. Murphy saying something about re-bonding to you; did he say anything about re-bonding?

A. He had some conversation about re-bonding.

Q. When did it occur?

A. The next morning.

That conversation was at our office. He said that this order that he had * * * that he had served a general order against anybody interfering with the goods of the Dry Goods Company from the Bankruptcy Court until the receiver was appointed. I don't know exactly what the purport was; anyway, that that restrained us and he didn't want us to move the goods because he would be responsible for them; they couldn't get away, they were there, and he would be responsible, if we would wait until he got some kind of an
101 order to keep the goods there, or he would re-bond it or anyway to fix it, or he would give his personal bond to indemnify us that those goods would not be taken out of our possession. Of

course I told him at that time we couldn't move those goods that day, because we had to get some one that understood moving those cases. I couldn't move them. We calculated to telephone out here and get a couple of men to move them for us. I know they were subsequently taken out of the store. They were taken out in one day. It took us a couple of days to get them out of there. I did not receive any notice of the sale by the trustee that was had on the 10th of October, 1904. I knew that that sale was going to occur. I saw an article in the paper it was going to be sold that day. I don't know whether a regular notice or not.

Q. I show you a notice of the Bankrupt Court of that sale, and I ask you if you saw that notice either in the newspaper or on a postal card, before the sale?

A. I can't tell you what I saw. I saw a notice, and whether that is the notice or not, I can't say, that that was advertised in the Troy Times. If it was in there, I might have read it. That is my best recollection.

Postal card marked defendant's Exhibit 31, for identification.

Q. Did you go before the referee in the United States Court on the tenth of October, to make any protests there either against the order of the sale on that day, or against the confirmation of that sale after it had been made?

Objected to, as incompetent and immaterial. Sustained. Exception.

102 —. I did not, in any subsequent talk with Mr. Murphy, after the 7th of October, 1903, say to him in substance that Mr. Barhite was insisting on our taking out those goods, but that I did not want to burn my fingers in the matter.

I don't remember anything of that kind. Nothing about burning my fingers.

Q. Did you say anything of that significance?

Objected to, as incompetent, immaterial and not binding upon the plaintiff. Sustained. Exception.

To Mr. BARHITE:

I stated, in answer to counsel, that after this injunction order was served on me in United States court in 1903, that I didn't do anything more about the goods, but I watched them to see them there. O, I did keep watch of them. When Mr. Murphy said he would be responsible if I wouldn't take them out, I knew that he was financially responsible. Matthew Heeran was sheriff of Rensselaer county in 1903, when these goods were replevied. He went out of office January 1, 1904. Victor M. Allen then became and is the present sheriff.

Q. Counsel has asked you some questions about Mr. Farrell appearing in court for the sheriff; has Mr. Farrell ever been counsel or attorney for the present sheriff?

Mr. Bailey objected to the question, as immaterial and irrelevant. Received. Exception.

A. No, sir; Mr. Farrel was counsel for Mr. Heeran.

The present sheriff has another counsel, Mr. Wager.

103 Mr. Wager has never appeared in these proceedings. I stated also that I was present at the time that this Mr. Murphy attempted to make this sale of these show cases in the United States court; I went there with my attorney, and I think Mr. Stone went with me. Notice of my rights were given at that time publicly.

Q. Do you recollect whether anything was said by Mr. Murphy or Mr. Bailey, his attorney, with regard to their guaranteeing the title?

Mr. Bailey objected, as incompetent and irrelevant.

Received. Exception.

After we gave notice, of course, they commenced asking questions if they would defend the title. If Mr. Murphy would; and he said he would defend nothing, they were only selling the right and title they had in there. William E. Murphy bought those show cases, a brother of the defendant.

To Mr. BAILEY:

I think Mr. Farrell, had this requisition, plaintiff's Exhibit 21, with him when I was there at that sale. He had all the papers there that morning, all we wanted.

He came there with us to give the notice. He gave the notice. I don't know whether he had the paper with him or not.

When I telephoned Mr. Bailey, October 11, 1904, I was in the office of Sheriff Allen, in the city of Troy.

In this paper, which has been marked defendant's Exhibit No. 70, sheriff's expenses, I see an item of $150 paid to James Farrell.

Q. What was that paid to him for?

104 Objected to as incompetent and immaterial.

Sustained. Exception.

JOHN T. NORTON sworn.

To Mr. BARHITE:

I live in Troy. I am an attorney, and counselor and attorney for the Century Mercantile Co., one of the defendants in this action. I was attorney for that company in 1903, and was also attorney for the Dodge Dry Goods Co.; was an officer of both of those companies in 1903, I think. I think I was a director in each. James E. Dodge was president of the Dodge Dry Goods Co. in 1903. He may have been all the year, but I am pretty sure he was from March on. He was an officer or director of the Century Mercantile Co. He was a director.

To Mr. BARHITE:

Q. Did you also know when Mr. Murphy made his inventory as receiver that he did not include those show cases in the inventory?

A. Yes, sir; he did not include any of this personal property under that arrangement I had with him.

Q. The show cases were not included in his inventory?
A. They were not included, under the arrangement with me.
Q. They were not included in the inventory?
A. They were not; the inventory shows that.

To Mr. BAILEY:

During this year of 1903 I had my office in this building, in the upper story. The store was in the lower stories. I was often in the store. I saw these show cases that form the subject matter of
105 this action, in that store during the months of June, July and August. They were in use by the dry goods company.
Q. Do you know what the financial condition of the Dodge Dry Goods Co. was in June and July, 1903.

Mr. Barhite objected as incompetent and immaterial.
Sustained.
Mr. Bailey excepted.

Q. I show you a letter, and I ask you if that was handed to you by the president of the Dodge Dry Goods Co. at or about its date?
A. Yes, sir, about the date; I am not sure about the exact date.

Letter marked Defendant's Exhibit No. 50, for identification.
(Defendant's Exhibit No. 50, for identification, is as follows:)

"ROCHESTER, N. Y., *June 24th*, 1903.

"Dodge Dry Goods Co.

"GENTLEMEN: The John Hofman Company of this city has placed "in my hands for collection an account against you amounting to "Four thousand dollars for show cases placed in your store in Troy. "The entire correspondence has been turned over to me and I find "that you have accepted the work and are now responsible for the "payment. In your letter to the Hofman Company under date of "June twentieth, you make demand for the allowance of certain "items from the amount of this bill. The only one of these items "which we can allow is for freight and cartage paid by you, $15.00.
"and $50.00 for extra men furnished by you to unpack the
106 "goods. In case of an amicable settlement we will allow
"these items, it being understood, however, that such allow-"ance is without prejudice to our rights in case we are compelled to "litigate the matter.

"Of course the Hofman Company is anxious to settle this matter "without resort to the courts and I may say that I am authorized "to make any settlement which is consistent with what is fair and "right, but we can allow no items except those which we have "stated. I will ask you to reply immediately to this letter and state "whether or not you will pay this bill. In case of your reply that "you will not, or in case that I do not hear from you immediately "upon the matter, I shall bring action against your Company.

"Respectfully yours,

"JOHN A. BARHITE."

Q. I show you a letter, and ask you if that was received by you at or subsequent to its date, through the mail?

A. I received it from Mr. Barhite, about the date that it bears.

Letter marked Defendant's Exhibit 51, for identification.

(Defendant's Exhibit No. 51, for identification, is as follows:)

"ROCHESTER, N. Y., *July 14th*, 1903.

"John T. Norton, Esq., Counselor-at-Law.

"DEAR SIR: Will you kindly inform me what you have decided
"to do about the claim of John Hofman Co. against the
107 "Dodge Dry Goods Co. as we desire the matter settled as
"soon as possible?

"Very truly,

JOHN A. BARHITE."

Q. I show you another letter, and ask you if you received that through the mail shortly after it is dated?

A. Yes, sir; I received it by mail.

Letter marked Defendant's Exhibit No. 52, for identification.

Defendant's Exhibit No. 52, for identification, is as follows:

"ROCHESTER, N. Y., *August 12th*, 1903.

"John T. Norton, Esq., Counselor-at-Law.

"DEAR SIR: I leave on my vacation to-morrow morning to be gone "until about the first of September. I am directed to say that unless "the claim of the John Hofman Company against the Dodge Dry "Goods Company is settled to the satisfaction of the John Hofman "Company before my return, that immediately thereafter we shall "commence suit.

"Yours respectfully,

"JOHN A. BARHITE."

Q. Do you remember the occasion of the appointment of a receiver of the Dodge Dry Goods Co.?

A. I knew it the next day, or a day or two afterwards. I remember the occasion of his taking possession of the store and contents as receiver. That was about the 21st of August, 1903.

108 Q. Do you know what he took possession of at that time?

Objected to, as incompetent, immaterial, and not proper cross-examination.

Sustained, as no part of the cross-examination.

Mr. Bailey excepted.

Q. Were you in the store often, during the months of August, September and October, subsequent to the appointment of the receiver?

A. Yes, sir.

Q. Were these show cases, during all that time, in the possession of the receiver, and in use by him in the conduct of the business?

A. They were.

Q. Was the defendant, the Century Mercantile Co., at any time prior to the commencement of this action, in possession of the chattels described in the complaint in this action?

Objected to, as before.

The COURT: I did not permit them to prove the declaration of the Dodge Dry Goods Company, with respect to that, so it is not part of the cross-examination, and I will sustain the objection.

Mr. Bailey excepted.

To Mr. BARHITE:

Q. This circular, Exhibit No. 25, was sent out by you as a result of a conference between you and the other officers of the company?

Mr. Bailey objected as immaterial and irrelevant.

Received. Exception.

109 A. The matter was turned over to me, and I prepared the circular, and I undertook to settle with the creditors. I am responsible for the circular. The matter of the settlement with the creditors was turned over to me for adjustment. The company was in the shape where it needed an attorney, and I was the attorney, and I did what I could to save the company.

The COURT: You undertook this on the recommendation of the company, or with their assent?

A. Well, I suppose with their tacit assent. They turned the matter over to me to see if I could save the company, and I used my own judgment as to what I should do.

To Mr. BAILEY:

Mr. Barhite asked me with regard to the inventory that was filed by the receiver. I do not know that that inventory was prepared by three appraisers appointed by the United States Court. The actual, physical preparation I do not know, but I know three appraisers were appointed and they went through the stock.

Q. You spoke of some agreement between yourself as attorney for the Century Mercantile Company and the attorney for the receiver, with reference to all the fixtures. What was that agreement?

Objected to as incompetent, immaterial and not binding upon the plaintiff, it having no knowledge of it. Sustained.

Mr. Bailey excepted.

Q. Were these show cases, the subject of this action, part of the fixtures in that store?

110 Objected to as calling for a conclusion.

Sustained.

Exception.

The COURT: This witness may answer why it did not go into an inventory, if he knows. I do not know as that agreement would be competent.

I know why the fixtures in that store were not put in that inventory that has been referred to.

Q. What was the reason?

To Mr. BARHITE:

Q. Was that agreement in writing?

A. We did not make any formal agreement. We simply had a conference about it.

Q. Was that in writing?

A. No, sir.

Q. You recollect the supplemental agreement, which contains these provisions as to the title to these fixtures, included the show case——

The COURT: Limit your answer to the reason why they did not go into the inventory. If the question was under discussion whether it should go in or not, state why it did not go in.

I claimed, on behalf of the Century Mercantile Co., to the receiver and his attorney, that the Century Mercantile Company owned these fixtures, and that is the reason it did not go in; and the balance of the reason was that we had an understanding that that matter would be presented to the court and adjudicated as to what our rights were under that supplemental agreement.

To Mr. BAILEY:

The court I refer to was the Bankruptcy Court. It was a part of that arrangement that pending the determination of the court as to whether the Dodge Co. or the Century Co. owned those fix-
111 tures they would not be inventoried. That is why they were left out of the inventory Pending that determination they remained in the possession of the receiver.

Q. Were they afterwards inventoried by the trustee who succeeded the receiver, and sold?

Objected to as incompetent and immaterial.

Sustained.

Mr. Bailey excepted.

To Mr. BARHITE:

This agreement made with the receiver I refer to was probably within a week or ten days after the receiver took possession. After his appointment. He took possession, practically, when he was appointed, as I remember it. The date of the order appointing him receiver, I think it was about the eighteenth of August, and this arrangement was made within a week or ten days after that.

Mr. NORTON: I wish to say that the Century Mercantile Company never had possession of these fixtures at any time.

Mr. BARHITE: There is no question here about the value of these show cases.

Mr. NORTON: I make no question about that.

Mr. BAILEY: It is admitted.

Mr. BARHITE: Then it is admitted that the value of the show cases is $4,000, as stated in the complaint?

Mr. BARHITE: I offer in evidence letter dated May 26th, 1903, signed by James E. Dodge, president, addressed to the John Hofman Company.

112 Mr. Bailey objected as irrelevant and immaterial as against the defendant Murphy.

Received exception.

Marked Exhibit 26.

"TROY, N. Y., *May* 26, 1903.

"Messrs. John Hofman Co., Rochester, N. Y.

"GENTLEMEN: I think it will be just as well before you render a "bill for your cases for us to receive them and have them set up "complete. As it is now, we have not even received the cases yet, "let alone placing them. I hereby return bill to you."

"Yours respectfully,

"J. E. DODGE, *Pres.*"

The plaintiff here rests.

Mr. BAILEY: On behalf of the defendant Murphy I ask the court to set aside the replevin that is mentioned in the return, and set aside the return, Exhibit 21, that was offered in evidence, for these reasons:

1. Because it does not appear upon the evidence that has been taken that the property was taken from the possession of the defendant Murphy, or from the possession of any agent or servant of his.

2. Because the property at the time of the alleged replevin, as shown by the return and the witnesses, to wit, October 6th, 1903, is shown to have been in the custody of the United States Court,

113 because this court was without jurisdiction of the subject-matter of this action, or any jurisdiction over these chattels at that time.

3. Because the evidence shows that Heeran did not take it into his actual possession while he was sheriff, and that to execute a replevin he must take it into his actual possession.

Motion denied. Exception.

Mr. BAILEY: I also make the additional motion and ask the court to direct a judgment or a verdict for the defendant Murphy, upon the following grounds:

1. That the plaintiff has not established against the defendant Murphy any cause of action.

2. That the plaintiff has not shown itself the owner of the chattels.

3. That the plaintiff has not shown itself entitled to possession at the time of the commencement of the action, but has shown that the then present right of possession was in the United States District Court.

4. That the plaintiff has not proven any demand on Mr. Murphy individually.

5. That the plaintiff has not shown that the property was in the possession of Mr. Murphy, individually, but that it was in possession of the United States District Court.

6. That the plaintiff has not shown any wrongful taking by the defendant Murphy, either individually or as receiver.

114 7. That the plaintiff has not shown any wrongful detention by Mr. Murphy, either individually or as receiver.

8. That the plaintiff has shown that Murphy had no power to make delivery of the chattels in suit at the time or prior to the time this action was commenced.

9. That this court has no jurisdiction over the subject-matter of this action at the time when it was commenced.

10. That no leave of the Federal Court having pos-ession of these chattels is shown for the bringing of this action prior to its commencement.

11. That it has not been shown that the defendant Murphy had possession of these chattels when this demand was made.

Motion denied. Exception.

Mr. NORTON: On behalf of the defendant The Century Mercantile Company, I move for the direction of a verdict in favor of the defendant, The Century Mercantile Company, upon the following grounds:

1. That there is no proof in this case that the defendant, The Century Mercantile Company, was ever in possession of the articles and chattels in question.

2. That there is no proof in this case that The Century Mercantile Company ever wrongfully or otherwise took possession of the chattels in question.

3. That there is no evidence in this case that the defendant,

115 The Century Mercantile Company, ever refused to deliver possession of the chattels in question, or that it ever had any possession upon which it could make a refusal.

4. That there is affirmative evidence in this case that The Century Mercantile Company never had possession of the chattels in question.

Mr. BARHITE: Do I understand counsel for the defense to say that the evidence is closed?

Mr. BAILEY: We have not rested.

Mr. BARHITE: I do not see how you can make application for the direction of a verdict, unless the evidence is closed.

Motion denied. Exception.

Mr. BAILEY: Upon the same grounds that I made the last motion, I ask the court to grant a nonsuit in behalf of the defendant Murphy.

The COURT: That is the same question.

Mr. BAILEY: I will put it in that form.

The COURT: Motion denied.

Mr. Bailey excepted.

Mr. BAILEY: On the same grounds I make a motion for the direction of a nonsuit, with reference to the three post cases, of the value of $150. These, you will recollect, were not any part of the contract that was originally made between the plaintiff and the New York firm, but the subject of a separate contract between the Dodge Company and the plaintiff, and they are not included in the letter

to which counsel had referred as the work which was not
116 accepted. They were the subject of a separate, distinct contract, and there is no proof that they were not accepted.

Motion denied. Exception.

Motion to direct a verdict in favor of the defendant, The Century Mercantile Company, was denied.

Mr. Norton excepted.

DODGE, JAMES E., sworn:

To Mr. BAILEY:

I reside in New York city. I am manager for the Fourteenth street store. I was with the Dodge Dry Goods Company, president, director and treasurer, and was general manager. The business of that company was to buy and sell dry goods; carrying on a department store, first, on Congress and Third streets and then later on the corner of State and Third streets, in Troy. I am acquainted with the chattels described in the complaint in this action. There was a contract made by the Dodge Dry Goods Company for the construction of these show cases with William Schwarzwaelder & Co., of Chichester.

Q. I show you a paper. Is that the contract?

A. Yes, sir.

Mr. BAILEY: I offer the contract in evidence.

Q. I show you a paper, which plaintiff has offered in evidence, marked Exhibit 5. Look at that and look also at the paper we have under discussion, and I ask you if the show cases that are mentioned in Plaintiff's Exhibit 5, by technical description, are a
part of the goods that were contracted to be made by Schwarz-
117 waelder for the Dodge Company set forth in that paper?

A. Yes, sir.

Paper offered in evidence. Received. Marked Defendant's Exhibit 54.

Defendant's Exhibit No. 54 was, in its material parts, as follows:

"NEW YORK, *January 16th*, 1903.

"Messrs. Church-Dodge Company, Troy, N. Y.

"DEAR SIR: We propose to manufacture, deliver and erect in "your new building, Troy, N. Y., by March 15th, the following "fixtures in accordance with the annexed specifications submitted "herewith, with the quantities of each enumerated." (Here follows description of property, which includes articles mentioned in the complaint.) "We will do the entire amount of work as per "schedule above for the sum of $8,460, to be paid for in the follow-"ing manner: One-third of the amount, or $2,820, in cash to be "paid on arrival of the goods at the building; one-third, or $2,830, "in cash, to be paid upon completion of the work, and one-third, "of the amount to be paid by a thirty-day note of -2,820, which

"note is to be endorsed individually by the directors of Church-
"Dodge Co.

"Respectfully,

"WM. SCHWARZWAELDER & CO.
"WM. SCHWARZWAELDER, *Pres't.*

"Accepted Jan. 16, 1903.
"CHURCH-DODGE CO.
"JAS. E. DODGE, *Pres't.*"

118 Q. Look at Plaintiff's Exhibit No. 5, and state if that includes all of the cases that are subject of this action, except the three post cases?

A. Yes, sir. The three post cases were the subject of a separate contract with the plaintiff, made by the Church-Dodge Company, and their price was $150. Those chattels, described in the complaint, were placed in the store of the Dodge Company, at Troy, in the month of May. Finished about the 1st of June, 1903. I was there in that store at the time the delivery was completed.

Q. In what condition were the show cases when they were delivered and set up there?

A. All right, with the exception of one case. That was a glass case.

Q. Wherein did that vary, if at all, from the contract?

Objected to as incompetent and immaterial. Sustained. Exception.

Q. What did you do with the show cases when they were set up there?

A. Accepted them.

Mr. Barhite moved to strike out the answer as not responsive.

Stricken out.

Mr. Bailey excepted.

Q. Was there any representative of the plaintiff there about the first of June, when they were set up?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Did you have any talk with him with reference to these show cases at the time?

A. Yes, sir.

Q. What did you say to him?

Objected to as incompetent, immaterial and not binding
119 upon the plaintiff, unless it is shown it was some officer of the plaintiff. A conversation with a workman is not material at all.

The COURT: I think the objection is sound until you show that he had some authority to represent the plaintiff generally and fully. I do not see how a workman's declaration would be competent against the plaintiff.

Exception.

(A letter which has been marked No. 40, for identification, shown witness.) I received that letter shortly after its date.

Q. I show you another paper and I ask you if you received that in connection with the letter, No 40, just shown you?

A. I did.

Mr. BAILEY: I offer this letter in evidence.

Received.

Defendant's Exhibit No. 40 received in evidence. (Appears at page 44.)

Mr. Bailey offered in evidence the paper inclosed in Exhibit No. 40.

Received. Paper marked Exhibit No. 41. (Appears at page 55.)

Q. Now, in view of that report, which was evidently made by Mr. Sherwood to the plaintiff, and the action they took upon it, I ask you what conversation you had with Mr. Sherwood while he was in Troy?

Objected to as incompetent, immaterial and not binding upon the plaintiff. Sustained.

Mr. Bailey excepted.

120 Q. What do you say as to the condition of the show cases when they were set up at that time?

A. Better than we expected they would be.

Mr. Barhite moved to strike out the answer.

Stricken out.

Their condition was all right, with the exception of the glove case. The contract called for the glove case to be made of glass. The glove show case was not all glass.

Q. By reason of that fact was it better or not than what the contract called for?

Objected to as incompetent and immaterial. Sustained. Exception.

The Dodge Company, of which I was general manager, with reference to these show cases after they were set up there about the first of June, put them in use immediately; filled them with goods; entered into complete use of them and continued that use from the time they were completed until the twenty-first day of August. On the twenty-first of August a receiver was appointed and took possession.

Q. I call your attention again to this letter written by the plaintiff on June 5, 1903, Exhibit No. 40, and I ask you if that letter correctly states the fact with reference to the installation of the show cases?

Objected to as characterizing the letter, and that the letter shows for itself. Sustained. Exception.

Q. This letter states that they were satisfactorily set in place. Now, I ask you when set in place if they were satisfactory to the Dodge Dry Goods Company?

121 Objected to as incompetent, immaterial and calling for a conclusion. Sustained. Exception.

When these show cases were set in place at that time, in that store, they were satisfactory to me.

Q. What was the financial condition of the Dry Goods Company at the time this letter of June sixteenth was written?

Objected to as incompetent and immaterial. Sustained.

Mr. BAILEY: We propose to show that these goods were, in fact, accepted by the Dodge Company at the time, as shown by the use that they made of them. That is evidence that overrides what they said. The fact was that the company was in financial straits and they expected to get in more capital and they were staving off in every way conceivable payment of their obligations, and the letter was written for that purpose.

The COURT: I think they may contradict that letter. I think they may show the facts to be different from what were stated in that letter, but I doubt if they have a right to give the mental operations of the writer of that letter. I think I will sustain the objection to that question.

Mr. Bailey excepted.

The COURT: We have not anything to do with the reason for writing, but you may show the fact to be different from what the letter states.

Q. You stated in that letter of June sixteenth that you refused to accept the case and work, referring to a part of that which was done by the plaintiff. As a matter of fact, is that statement in your letter correct?

122 Objected to as incompetent, immaterial and varying the terms of the letter. Sustained.

Mr. Bailey excepted.

The COURT: I will permit you to show the fact to be different from what this man at that time said it was.

Q. What was the fact with reference to the acceptance of these cases by the Dodge Company? Had they accepted them, or had they not?

Objected to as calling for a conclusion. Sustained. Exception.

Q. When you say that the show cases were all right, with the exception you have made with reference to the glove case, what do you mean by that, that they were completed in accordance with the contract that the Dodge Company had made with Schwarzwaelder, or what?

Objected to as leading. Sustained.

When I say they were all right, I mean that they were all right. They were in keeping with the contract, with the exception of that one case, and that exception is what I have referred to.

The directors of the Dodge Company did not authorize the making of any complaint with reference to these show cases or any rejection of them in any form.

The Dodge Company did not, nor did I, on its behalf, ever make any complaint to Schwarzwaelder & Company with reference to these show cases mentioned in the complaint or any of them.

I did not ever write to Schwarzwaelder & Company claiming that the show cases in any respect were not in conformity with the contract with the Dodge Company.

123 (A letter dated March 4, 1903, shown witness.)

I received that letter in the mail shortly after its date.

Mr. Bailey put the letter in evidence, and it was marked Defendant's Exhibit No. 39, is as follows:

"ROCHESTER, N. Y., *March* 4, 1903.

"Mess. Church-Dodge Co., Troy, N. Y.

"GENTLEMEN: Mess. Schwarzwaelder & Co., of New York city, "desire us to make *for them* a quantity of show cases to be delivered "in your new store. They also request us to make every effort that "will effect an early installation of same in your store, but unfor- "tunately we are unacquainted with their financial condition, and "they have no rating in the commercial books; therefore, we must, "as a matter of business, make an investigation with regard to their "responsibility before proceeding with their order and which may "require several days.

"Now, in order to prevent delay, which will necessarily be oc- "casioned as result of such an investigation, it occurred to us that "you would probably guarantee the payment of same to us.

"If this proposition meets with your approval, we will gladly send "you a list of the cases we are to furnish, also the price of same in "order that you may know what you would be liable for.

"We will ask you to please advise us promptly in regard to this "matter, and greatly oblige,

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN."

124 It was admitted that John Hofman was the president of the John Hofman Company.

Mr. Bailey put in evidence letter dated May 25, 1903, from the Dodge Company to John Hofman, marked Defendant's Exhibit No. 42, and is as follows:

"*May* 25, 1903.

"Messrs. John Hofman Co., Rochester, N. Y.

"GENTLEMEN: On Wednesday received a telegram from you stat- "ing our cases had been shipped. As yet we have not received goods "nor have we received from you shipping receipt. Kindly send "tracer after these goods, also send us shipping receipt.

"Yours respectfully,

"JAMES E. DODGE, *President.*"

Q. Did you receive that telegram?
A. Yes, sir.

Mr. Bailey put in evidence telegram dated May 21, 1903, and marked Defendant's Exhibit No. 43, and is as follows:

"ROCHESTER, N. Y.

"Dodge Dry Goods Co., Troy:

"Your show cases will be all shipped to-day.

"JOHN HOFMAN CO."

Q. I show you a letter dated May 25, 1903. Was that received by you through the mail?

A. Yes, sir.

125 Letter put in evidence and marked Defendant's Exhibit No. 44, and is as follows:

"ROCHESTER, N. Y., *May* 25, 1903.

"Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: Your letter of the 23d at hand, and in reply will "say that we will have the last shipment of show cases traced at "once, the shipping receipt for which we have already mailed you. "We also enclose invoice for the cases, and we remain,

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN."

Q. Did the John Hofman Company forward to you the shipping receipts for these various shipments, including the goods that are mentioned in the complaint?

A. I believe they did.

Q. Did you receive that telegram dated May twenty-eighth?

A. Yes, sir.

Telegram put in evidence and marked Defendant's Exhibit No. 45, and is as follows:

"10:15 A. M.

"13 A DO SN 10 paid.

"ROCHESTER, N. Y., *May* 28.

"Dodge Dry Goods Co., Troy, N. Y.:

"Our man leaves this morning to set up your cases.

"JOHN HOFMAN CO."

126 Q. I show you an order dated March 16, 1903, which is the same that is marked Plaintiff's Exhibit No. 9, and I ask you if that is the original, of which a copy was introduced in evidence by the plaintiff?

A. Yes, sir.

Q. I show you a letter dated March 17, 1903, and I ask you if that was received?

A. Yes, sir.

Letter put in evidence and marked Defendant's Exhibit No. 49, and is as follows:

"ROCHESTER, N. Y., *March* 17, 1903.

"Mess. Church-Dodge Co., Troy, N. Y.

"GENTLEMEN: Enclosed please find order from Mess. Schwarz-"waelder & Co., directing you to pay us $3,850 when we shall have "satisfactorily furnished you certain cases. Please acknowledge "receipt of this order and advise us that you will honor same and "oblige.

"We are in receipt of a corrected floor plan from Mess. Schwarz-"waelder & Co., which gives us all the information needed in regard "to measurements, and we remain,

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN.

"Enclosure."

Q. Look at that order, which is Plaintiff's Exhibit No. 9. Was that ever endorsed by the John Hofman Company?

A. No, sir.

Q. Will you read that order and tell me what is meant by the words, "Detail O. K.'d by your Mr. James E. Dodge," what it refers to?

127 A. This detail means the blue prints, or floor plans, showing the sketches and positions of the fixtures which I had previously O. K.'d. I have not those in my possession. To whom I delivered them I do not recollect. I don't know if I ever delivered them to the defendant, Mr. Murphy.

Q. I show you a letter dated June 18, 1903, was that received by you?

A. Yes, sir.

Letter put in evidence and marked Defendant's Exhibit No. 58, and is as follows:

"ROCHESTER, N. Y., *June* 18, 1903.

"Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: Your letter of the 16th with regard to show "cases at hand, and in reply beg to state that the contents of same "very much surprised us, and we will ask you to advise us by re-"turn mail what you consider a proper settlement, and we remain,

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN."

Q. I show you a letter (marked Defendant's Exhibit No. 50, for identification) and ask you if that was received by you?

A. Yes, sir.

Mr. Bailey offered the letter in evidence.

Objected to as immaterial and not binding on the plaintiff.

Sustained.

Defendant's Exhibit No. 50, for identification, appears on page 105, above.

Examination suspended.

128 BARHITE, JOHN A., sworn.

To Mr. BAILEY:

Q. About June 24, 1903, did the John Hofman Company retain you to represent it and act for it in the matter of this claim against the Dodge Company?

A. Mr. Bailey, I cannot answer that question in that shape. They did this——

Q. Answer the question yes or no?

A. I will answer it, yes.

Q. Did they direct you to take such action in the matter as you might think proper?

A. No, sir.

Q. Did they give you any directions in the premises?

A. Nothing, except to——

Q. Did they give you any directions?

A. Yes, sir.

Q. Did they place in your hands for collection the account against the Dodge Dry Goods Company?

A. No, sir.

Q. Then do you say that this statement in this letter is incorrect: "The John Hofman Company, of this city, has placed in my hands for collection an account against you amounting to $4,000, for show cases placed in your store in Troy." Do you say that is not correct?

A. No, that letter is correct.

Q. Then John Hofman had placed that in your hands for collection?

A. At that time, yes, sir, when the letter was written.

Mr. BAILEY: I submit I have shown the authority of Mr. Barhite to write that letter direct from the company, and that it is competent, and I can offer it in evidence.

129 The COURT: I do not think the letter is competent, unless some action was taken upon it by the company.

Mr. Bailey excepted.

DODGE, JAMES E., recalled.

To Mr. BAILEY:

Q. What did you do upon receipt of this letter which is marked Exhibit No. 50, for identification?

A. I gave it to our attorney.

Q. What did you do, if anything, after the receipt of that letter, and because of it, with reference to the letters you had theretofore written to the Hofman Company in which you had, in terms, refused to accept a portion of the work?

Objected to as incompetent and immaterial. Sustained. Exception.

Q. Is it not a fact that after this letter you did not continue your refusal to accept?

Objected to as incompetent, immaterial, and calling for a conclusion. Sustained. Exception.

Q. After the receipt of this letter, Exhibit No. 50, did the Dodge Company use continuously, until the receiver was appointed, these show cases?

A. Yes, sir.

Q. After the receipt of this letter, and when the Dodge Company went into bankruptcy and the schedules of the creditors of the bankrupt were prepared, did you list the John Hofman Company as a creditor of the bankrupt for the sum of $4,000?

A. Yes, sir.

Q. And that was because of the position taken by the plaintiff in this letter, Exhibit No. 50, was it?

130 Objected to as incompetent and immaterial, and calling for a conclusion. Sustained. Exception.

Mr. BAILEY: I again offer this letter Exhibit No. 50, in evidence. Objected to, as before. Sustained. Exception.

(Defendant's Exhibit No. 50, for identification, appears in full on page 105, above.)

Q. You stated you submitted that letter to your attorney?

A. Yes, sir.

Q. Were you advised by him as to whether or not you had, in fact, accepted those goods, as this letter claims you had, or not?

Objected to as incompetent and immaterial. Sustained. Exception.

Mr. BAILEY: I offer in evidence letter dated July 14, 1903, written by Mr. John A. Barhite to Mr. Norton.

Objected to as incompetent and immaterial.

Marked Exhibit No. 51.

Sustained. Exception.

(Defendant's Exhibit No. 51 appears at page 106, above.)

Mr. BAILEY: I offer in evidence another letter from Mr. Barhite to Mr. Norton, dated August 12, 1903, and marked Defendant's Exhibit No. 52, for identification.

Objected to, as before. Sustained. Exception.

(Defendant's Exhibit No. 52 appears at page 107, above.)

Q. I show you a letter dated May eleventh. Was that received by you?

A. Yes, sir.

131 Letter put in evidence and marked Defendant's Exhibit No. 55, and is as follows:

"ROCHESTER, N. Y., *May* 11, 1903.

"Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: We are in receipt of your telegram and in reply "would say that we are hard at work on your cases and expect to "ship some the fore part of the week. In fact, we think we may

"be able to get them all off next week, except the three cases for the "posts, and we remain,

"Yours very truly,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN.

"Dic. J. H."

Q. Did the plaintiff, after that letter written by Mr. Barhite, on June twenty-fourth, make any claim or demand upon you, either personally or as an officer of the Dodge Company, for the possession of these show cases, from that time down to the period subsequent to the appointment and qualification of the receiver?

A. No, sir.

Plaintiff did not do anything during that period, other than demand payment of the amount of the bill that has been offered in evidence.

I recollect the occasion on or about the twenty-first of August when Mr. Murphy called at the store and notified me that he had been appointed receiver.

He told me that the United States Court had made him receiver of all the assets of the Dodge Dry Goods Company.

132 He demanded possession of them, showing order appointing him, or a copy of it. In connection with that I gave him possession of the assets.

The property that I gave him possession of at that time was merchandise and fixtures in the store, also supplies and book accounts; all the property of the Dodge Dry Goods Company. And all the property that was in possession of the Dodge Dry Goods Company.

And among the things I turned over to him were included these show cases that are the subject of this action. There was no exception made of the show cases.

Q. Were the show cases a part of the fixtures delivered to him?

Objected to as incompetent, immaterial, and calling for a conclusion. Sustained. Exception.

The COURT: I think we must state what he said to the receiver, so that we will see whether he delivered them or not.

I handed him the keys of the store and told him its contents were the property of the Dodge Dry Goods Company. And these show cases were part of the contents at that time. There was no special mention made of the show cases at that time. At that time I was the executive officer of The Century Mercantile Company, and The Century Mercantile Company held the paper title to that building at that time.

There was an arrangement made between me and the receiver, with reference to the leasing of that store. It was made on the twenty-first of August. He leased it from day to day at so much per day.

Just prior to the time when these bankrupt proceedings were commenced these show cases were in the possession of the Dodge Dry Goods Company.

133 Q. Who owned them at that time?

Objected to as calling for a conclusion. Sustained.
Mr. Bailey excepted.

At the time possession was turned over to the receiver these show cases were full of goods, and the goods were the property of the Dodge Dry Goods Company.

The receiver continued business there. He employed me as an employee of his. He employed Mr. Harper.

Q. After the receiver was appointed and took possession, did you retain or have any right of possession or right of entrance into that store in any other capacity other than as employee of the receiver?

Objected to as incompetent, immaterial, and calling for a conclusion. Sustained. Exception.

Q. As an employee of the receiver, were you given a key and access to the store?

A. Yes, sir.

Q. In any other capacity whatsoever, did you have any access to that store?

A. No, sir.

Q. Do you know if the same was true of Mr. Harper?

A. Yes, sir, that is, he had access as an employee of the receiver.

I did not say anything to the receiver on the twenty-first of August about this voluminous correspondence with the Hofman people that has been introduced in evidence here.

Q. At the time possession was delivered to the receiver, and at the time the store was leased to the receiver, all of which occurred on the 21st day of August, 1903, was any mention made by you of
134 the claim of The Century Mercantile Company of an ownership in these fixtures?

A. I notified him that we would claim title to the fixtures under agreement with the Church-Dodge Company.

Q. When did you notify him?

A. On the twenty-first day of August.

Q. Are you positive with regard to that?

A. Yes, sir.

Q. Was that before, at the time, or after possession had been delivered to the receiver?

A. After.

Q. After possession had been delivered to the receiver?

A. Yes, sir.

Q. What did the receiver say when this claim, based upon this agreement that is in evidence here of The Century Mercantile Company, was brought to his attention?

Objected to as incompetent, immaterial, and not binding upon the plaintiff. Sustained. Exception.

Q. Did you, subsequent to the time possession was delivered by the Dodge Company to the receiver of the fixtures, including these show cases, as and on behalf of the Century Mercantile Company, demand possession of the fixtures from the receiver?

A. I don't know how to answer that question.

The COURT: Did you in behalf of The Century Mercantile Company demand these fixtures of the receiver?

A. I demanded them after they were delivered to Mr. Murphy.

Q. By Mr. Murphy, do you mean Mr. Murphy individually or as receiver?

A. As receiver.

Q. What response did the receiver make to that demand?

Objected to, as immaterial, and not binding upon the plaintiff. Sustained. Exception.

135 The COURT: I will withdraw the ruling. You may have an answer to that question.

Q. What response did the receiver make to that demand?

A. He refused to deliver them.

The COURT: How long were you there in the employ of the receiver?

A. From the 21st of August until about the 1st of December.

Q. During all that time, did these show cases remain in the use and possession of the receiver?

A. Yes, sir.

To Mr. BARHITE:

I formerly owned this property upon which this store stood and sold it to The Century Mercantile Company after I had made a lease to the Church-Dodge Company, which afterwards became the Dodge Dry Goods Company. I was one of the organizers of The Century Mercantile Company, and was an officer of that company.

Q. And held or owned a majority of its stock?

Mr. Norton objected as immaterial.

Received. Exception.

A. I did.

The position I held in The Century Mercantile Company was president and treasurer. And I was such president and treasurer from its organization until the present time.

It is still in existence, but does not still own the building in question.

The Century Mercantile Company, organized in the fall of 1902, I think, or the summer.

Q. Was it before or after you made the lease of that property?

Mr. Norton objected as immaterial.

Received. Exception.

136 A. I think it was before. How long before I don't know. I haven't any recollection on the subject.

I was also an officer of the Dodge Dry Goods Company.

Q. And owned a majority of the stock in that company?

Mr. Norton and Mr. Bailey object, as immaterial.

Received. Each defendant excepts.

A. At what time?

Q. At any time before it went into bankruptcy?

Objected to, as before. Received. Exception.

A. It was some time before.

Q. When?

Objected to, as before. Received. Exception.

A. I think, about six months.

In the winter of 1902, or January, 1903.

Then, afterwards, more stock was sold. So the control passed out of my hands. But I still remain as president and treasurer. I was thoroughly familiar at all times with these leases made in September, 1902, and also the supplemental agreement, with regard to the show cases and fixtures. And when Mr. Murphy came to our place on the 21st day of August and stated to us that he had been appointed receiver, I had that agreement in mind. I did not know that that thing was coming, that the receiver was to be appointed. No papers had been served on me until the 21st of August.

When he came and told me that he had been appointed receiver I then told him about these fixtures and show cases, that I claimed them on behalf of The Century Mercantile Company. After
137 he had given his instructions of what he desired done in the store.

Q. That was practically at the same time that he told you that he had been appointed receiver, or in the same conversation?

A. It was after he had finished.

He came there and told me he had been appointed receiver, and demanded possession of the store, and told me what he wanted done with the store. And after he had done that, then I made a demand upon him for these show cases and fixtures on behalf of the Century Mercantile Co.

Q. Then all of that occurred in one conversation?

A. No, sir.

Q. How long after he had told you?

A. It might have been fifteen or twenty minutes until we got our lawyers there and consulted them, or it might have been half an hour.

He refused to deliver them to me. Now I say all the time until December first these show cases remained in the possession of the receiver there in the store. I knew that the sheriff had been there after them. I did not know that they were kept there by virtue of that injunction order in the United States District Court. I knew that such an injunction was out.

Q. And that was your understanding of it?

A. What was my understanding?

Q. That they were held there by means of that injunction?

A. No, sir.

I knew the injunction was out, restraining the sheriff.

I don't know when did I ever have any talk with the receiver again about the show cases, after he took possession on the 21st of August.

I remember a time when a meeting of creditors was held in
138 Troy. I first learned that the plaintiff demanded possession of those show cases about ten days after the bankrupt proceedings, after the receiver had been appointed. That would be along about the first of September, between the first and tenth.

I don't know from whom I learned that.

Q. Have you in mind anybody else from whom you might have heard it?

A. Yes, sir.

Q. Who?

A. Our attorney, John T. Norton.

I knew Mr. Bailey was an attorney and the law partner of Mr. Murphy.

Q. You think you might have heard it from the receiver?

A. I don't know.

Q. When did you first inform the receiver about this correspondence we have been talking about?

A. I never informed him of it—well, probably after—I don't remember anything about that. I couldn't tell you. I have no recollection on the subject.

Q. You say you did not tell him of this correspondence on the 21st of August?

A. Not one word.

Q. Did you tell him about any other correspondence you had?

A. I think not.

Q. You simply didn't say anything about any of your correspondence that you had on hand at that time?

A. I couldn't tell you.

Q. You have no recollection of it?

A. We had no correspondence other than that. Everything was cleaned up except this matter of yours. I know what I mean by correspondence.

Q. You had other letters in your store besides that had been written to you by the John Hofman Company?

A. Not unanswered.

Q. These were answered?

A. All matters were closed, excepting that one matter.

139 Q. That is not the question, whether the matters were closed; you do not mean to say that in your dry goods store you did not have any letters from anybody except those written you by the John Hofman Company, do you?

A. Of course, we had letters. A large number of them.

About one thousand and one different things. I did not tell him about any of that correspondence; I simply didn't say anything about it.

Q. You said that you were employed by the receiver and had access to the store; you practically ran the store right along just the same, after he was appointed receiver?

A. No, sir. I had charge of the running of the store under his direction.

Mr. Murphy was not a dry goods man, he was a lawyer, and——

Q. And knew nothing about the dry goods business?

A. That I couldn't tell you.

So far as I knew, he had never had any experience in that business. I have known him for some years. He had to buy the goods after he was appointed receiver, buy coal, and pay clerks, and perform all the operations necessary to run a large dry goods store.

I was shown this contract here between Schwarzwaelder and John Hofman Company, and I stated those show cases in that contract were the same ones mentioned in our contract. I have seen this contract before.

Q. When?

A. You mean the individual piece of paper you have in your hand?

Q. I mean this contract?

A. I have seen a copy of that contract. It was sent to my office in Troy by the John Hofman Company probably some time prior to May first.

Q. Do you remember just when?

A. No, sir, I do not.

140 To Mr. NORTON:

With regard to the time when I had knowledge of the appointment of this receiver, it is a fact that the receiver was appointed without any notice preceding his appointment given to the company. And the officers of the company were not aware of any receivership until after the receiver had been actually appointed.

Q. Was The Century Mercantile Company ever in the possession of the chattels involved in this action?

Mr. Barhite objected as calling for a conclusion. Sustained.

Mr. Norton excepted.

The Century Company never occupied the portion of the building known as the Dodge Building, where these fixtures were, at any time, nor did The Century Mercantile Company ever have any storehouse or place where these fixtures were. Nor were these fixtures ever at any place over which The Century Mercantile Company had any control.

I, as an officer of The Century Mercantile Company did not ever have anything to do with these fixtures. I did not ever do anything with regard to them, other than demand possession of them from Mr. Murphy. As to that demand, I think that was made on the 21st of August, 1903. I did not know at that time, on that day, that the Hofman Company had presented this demand which they have offered in evidence here, to Mr. Murphy, as receiver.

Q. In the course of the conversation about this supplemental agreement or lease, and the claim which The Century Com-
141 pany made as the owner of those fixtures, was this demand from the Hofman Company brought up?

A. No, sir.

When Mr. Murphy took possession of the store and the property there our attorneys were not present. They were sent for. And the

attorney for the Dodge Company happened also to be the attorney for The Century Mercantile Company. And it was after he came upon the scene that this demand upon Murphy was made, and not before. And, at that time, all the property had been turned over to Mr. Murphy. The Century Mercantile Company had an office in that building. And that was separate, distinct and apart from the part of the building occupied by the Dodge Dry Goods Company. And except that The Century Mercantile Company was the landlord of the Dodge Dry Goods Company, it had nothing whatever to do with the floors and portions of the building occupied by the Dodge Dry Goods Company. And the same continued to be the case after the receiver took posession.

And, aside from collecting the rent, The Century Mercantile Company had nothing to do with that part of the building where these fixtures were.

To Mr. BARHITE:

Q. After Mr. Murphy was appointed receiver, did he remove his office to the building?

A. Yes, sir.

Q. Did he still have an office at his law office, and come around from day to day?

A. He had two offices.

Q. A law office and one over there?

A. Yes, sir.

Q. You have stated that you sent for the attorney of the Dodge Dry Goods Company and The Century Mercantile Company?

A. Yes, sir.

Q. And that was Mr. Norton?

A. Yes, sir.

142 Q. He represented both companies?

A. Yes, sir.

Q. And Mr. Norton, as attorney for The Century Mercantile Company made a demand upon himself as attorney for the Dodge Dry Goods Company for the show cases?

A. No, sir.

Q. How was that done?

A. He made a demand upon the receiver.

Q. Of the Dodge Dry Goods Company?

A. Yes, sir.

To Mr. NORTON:

Q. Mr. Norton was not the attorney for the receiver, was he?

A. No, sir.

Mr. BAILEY: I offer in evidence petition in bankruptcy in the matter of the Dodge Dry Goods Company, filed in the District Court of the United States, in the Northern District of New York, August 17th, 1903.

Mr. BARHITE: I object as incompetent, immaterial and nowise binding upon the plaintiff. I do not object to the fact of a petition

being filed, but I object to the petition being offered in evidence itself.

The COURT: I will limit it to showing that there was a petiton of bankruptcy filed.

Marked Defendant's Exhibit No. 1, and was the usual petiton in bankruptcy, and shows filing August 17th, 1903, and in connection therewith the usual affidavit upon which application for receiver was made.

Mr. BAILEY: I offer in evidence, in that same proceeding, affidavit of Charles L. Greenhall, made for the purpose of obtaining the appointment of a receiver, filed August 20th, 1903.

143 The COURT: I will receive it for the purpose of showing the regularity of the bankruptcy proceedings, but not its contents, or for any other purpose.

Mr. BAILEY: I offer in evidence an order to show cause, an order appointing a receiver, made August 18th, 1903, and filed August 20th, 1903.

Received. Exception.

Marked Defendant's Exhibit No. 2.

(This appears, in its material parts, at page above.)

Mr. BAILEY: Also, petitioner's bond, referred to in that order, filed and approved August 20th, 1903.

Received and marked Defendant's Exhibit No. 3.

(This shows a bond, in compliance with the order of the Federal Court.)

Also a bond of the receiver, and the approval of it, filed August 20th, 1903.

Received and marked Defendant's Exhibit No. 4.

(This shows a bond, in compliance with the order of the Federal Court.)

Also, order made October 6th, 1903, which continued the receivership.

Received and marked Defendant's Exhibit No. 5, which was an order made October 6th, 1903, in the Federal Court, continuing Edward Murphy, 2d, as receiver, and directing the continuaton of the business by him, and providing for a further bond of $10,000. Shows entry on that day.

Also, bond, which is mentioned in the order continuing the receiver and the order approving it, showing it is filed.

144 Received and marked Defendant's Exhibit No. 6, which shows filing of the approval of the bond in pursuance to order.

Also, from the record of the District Court in Bankruptcy, the petition of Edward Murphy, 2d, the receiver, verified October 8th, 1903, upon which was granted the order dated October 9th, 1903, which the plaintiff has offered in evidence.

Mr. BARHITE: I object to it, as incompetent, immaterial, and in no wise binding upon the plaintiff.

Sustained.

Mr. Bailey excepted.

Paper marked Defendant's Exhibit No. 7, for identification. De-

fendant's Exhibit No. 7, for identification, was a petition by the receiver, made October 7th, 1903, recited in the order, Plaintiff's Exhibit 22.

Also, decree of the United States Court, adjudicating the Dodge Dry Goods Company a bankrupt, made and entered October 14th, 1903.

Decree marked Defendant's Exhibit No. 8.

This is the usual decree, adjudicating Dodge Dry Goods Company bankrupt.

Also, order of reference, referring all matters in that proceeding to Mr. King, to show his jurisdiction in the premises.

Marked Defendant's Exhibit No. 9.

This is the usual order, empowering Edwin A. King to act in the matter of the Dodge Dry Goods Company.

Also, notice of motion in the bankruptcy matter, which is
145 without date, but is addressed to H. D. Bailey, Esq., attorney for Edward Murphy, 2d, receiver, etc., signed by John A. Barhite, attorney for John Hofman Company.

Received and marked Defendant's Exhibit No. 14.

(Defendant's Exhibit No. 14 appears at page 82, above.)

Also, an order made in the bankruptcy proceedings, October 6th, 1903, at Auburn, which recites the application by the receiver to the court for directions as to what he shall do with reference to various fixtures in the store, and the order directs that the action shall be delayed until after the appointment of the trustee. I offer this for the purpose of meeting the charge that this receiver never claimed to assert any control over these fixtures until after this action was begun.

Objection. Sustained.

Mr. Bailey excepted.

Paper marked Defendant's Exhibit No. 15, for identification.

Defendant's Exhibit No. 15, for identification, was an order made by the Federal Court, October 6th, 1903, and it refers to some of the fixtures, which were claimed by The Century Mercantile Company, and referred to paper submitted, which show the consent of that company to the determination of the question of title by the Federal Court, and directed that the matters referred to "be held over to await "action upon the appointment of a trustee herein." But did not refer to the property in this action.

Mr. BAILEY: Mr. Norton, who is counsel for the Century
146 Mercantile Company, and also corporation counsel of the city of Troy, was called home last night and he asked me to request the court that he might be deemed to have made the objections and taken the exceptions made by the other defendant in this action.

The COURT: That may be done.

Mr. BAILEY: And at the close of the defendant's case to have renewed his motions for the direction of a verdict.

The COURT: That may be done.

MURPHY, EDWARD, 2D, sworn.

To Mr. BAILEY:

I am one of the defendants in this action, and reside in Troy. I am the person who was appointed receiver of the Dodge Dry Goods Company, August 18th, 1903. Upon my appointment I qualified. I next obtained a copy of the order appointing me receiver, and went to the Dodge Building, where the Dodge Dry Goods Company was conducting its business, and called upon the president and general manager of that company, James E. Dodge, and notified him of my appointment and told him that I came there to take possession of all the property of the Dodge Dry Goods Company.

In response to that demand Mr. Dodge said he would take me through the building and show me all of the property, and he did take me through all the different departments in the store, and showed me all the property of the Dodge Dry Goods Company, and I took possession of it. Also, he turned over to me the keys of the building.

The property that he showed, as the property of the Dodge Dry Goods Company, was stock, dry goods and merchandise, the
147 complete store equipment, consisting of show cases, counters, shelving, pneumatic tube service, soda fountain, several office safes, office furniture, and some cash and book accounts, and books of the Dodge Dry Goods Company.

He told me that the soda water fountain and the pneumatic tube service were held by the Dodge Dry Goods Company upon conditional sales agreements and that there was a balance unpaid upon those articles, and that the title to those articles was not to pass finally to the Dodge Dry Goods Company until the balance was paid.

That was all the fixtures as to which any particular mention was made at that time.

The show cases that are the subject of this suit, when I took possession, were on the ground floor of the Dodge Dry Goods Company building, and the goods were in them, when they were turned over to me as receiver. They were all filled with goods.

(Paper, which is marked Plaintiff's Exhibit No. 20, shown witness.)

The demand that was made upon Murphy, as receiver, I recollect the time when that paper was delivered to me, or a copy of it. At that time I said that I held all these goods as receiver of the Dodge Dry Goods Company, and that I couldn't deliver them to any person without instructions from the United States Court, and I suggested to the person who served them upon me that application be made to the court for instructions for the receiver.

I have seen on the trial of this action, contracts between the Dodge Dry Goods Company and Schwarzwaelder & Company, and
148 between Schwarzwaelder and Hofman, and a large amount of correspondence.

These contracts were not, nor were any of them, nor were these

leases, or any of them, ever shown to me or called to my attention at any time prior to the commencement of this action.

I took possession of these show cases as receiver of the Dodge Dry Goods Company. The summons in this action was served upon me October 6th, 1903, about five o'clock in the afternoon.

I am able to fix the time of day when it was served, as I was in Nassau that day at a convention. The convention was called to be held at twelve o'clock, but it was not actually convened until about one o'clock. After the convention adjourned, which was about two, we had lunch, and left Nassau along about half-past three, between three and half-past, in the afternoon, and I didn't get to Troy until about five o'clock. From Nassau to Troy I should think was twenty miles. I went to Albany on the electric railroad, and I had to change at Albany to the electric cars between Troy and Albany.

The summons was served on me by Deputy Sheriff Stone. I met him on Third street, Troy, between State and Broadway, in Troy.

Mr. Stone told me that he had been looking for me to serve some papers on me. He said he had already served on the Century Mercantile Company. He handed me the papers—I am not sure whether he handed them to me on the street or up in Mr Norton's office. Anyhow, it was suggested by one of us, I think, Mr. Stone, that we go to Mr. Norton's office. So we went to Mr. Norton's office and we found him in, and the papers were served. Whether served in the office or on the street, I am not quite certain. I looked the
149 papers over. After looking the papers over I discovered that the suit was against me individually, so I told Mr. Stone that I held those cases as receiver of the Dodge Dry Goods Company, and I called his attention to the fact that I had previously, and shortly after my appointment, served upon him an injunction order, or rather upon the sheriff of Rensselaer county, an injunction order restraining all persons from interfering with the property of the Dodge Dry Goods Company. I told him that if he touched any of that property it would be a great damage to the creditors of the Dodge Dry Goods Company, and I thought he would get himself in trouble with the United States Court. That is practically the substance of the conversation.

I did not say anything to Mr. Stone about my giving an indemnity bond. I didn't say anything of the sort, or about re-bonding the property in any way.

I think Mr. Norton did.

The sheriff, I believe, asked Mr. Norton if he would re-bond, and Mr. Norton said he would have three days, under the Code, after they should take the property, in which to do that, and that he would think about it, and if there was any occasion for it, he would re-bond.

Stone did not go into the store, where these show cases were, with me. We passed from the street into the back part of the same building where the store is, to a hallway, in the back part of the store. Mr. Norton's office was above the store.

I did not go through the store, to go to Mr. Norton's office, but into the store building. I did not know, at that time, that Stone had been

in the store. I first learned that he had been in the room where these show cases were, almost a year afterwards.

150 These show cases remain in my possession as receiver, and in use by me as receiver, from the time that I was appointed until I turned them over to myself as trustee in bankruptcy. That was the 1st of December, 1903, I believe.

During all that time I was carrying on the business at the store, as receiver. That was a department store. I employed, as receiver, about 200 clerks. As receiver, with reference to this matter, after the summons in this action was served upon me, I kept right on using the stuff. No change whatsoever in my possession or use of it. I made an application to the United States Court with reference to it, and it was upon that application, as receiver, setting forth the facts of what had taken place, that this order of October 9th, 1903, which the plaintiff has offered in evidence, was made. Subsequently, as trustee, pursuant to the order of the United States Court, I sold these show cases, and that sale was a public auction, these show cases with other fixtures. The terms of that sale were prescribed and made by the United States Ciurt. The fixtures, including these show cases, were sold to James F. Byron, who afterwards assigned his bid to William E. Murphy, my brother. I made a report of that sale to the United States Court, and it was confirmed.

As trustee, pursuant to the direction of that court, I made a conveyance of all the property that was sold and delivered it to the purchaser, to the assignee of that bid. I recollect what the fixtures, including these show cases, brought at that sale, something over sixteen hundred dollars.

The COURT: I admit this upon the question of value.

151 Mr. BAILEY: I am not trying to prove the value, but to show that the proceeds of these fixtures, which included the show cases, went into the bankruptcy court and was distributed there by that court.

The COURT: I was admitting this testimony upon the question of value.

Mr. BAILEY: There is no question as to the value of these show cases, so it is not offered upon any question of value. I think I have a right to show what the United States Court did with reference to it.

Objected to as before. Received.

Q. And that money was paid to you as trustee?

A. Yes, sir.

Q. What was done with the money?

A. It was turned into the United States Court, and afterwards distributed among the creditors of the Dodge Dry Goods Company as a part of the bankrupt estate.

I have heard the testimony of the plaintiff's witness, Mr. Baucus. I had conversations with him several times with reference to this. I never promised to give him, or suggested that I would give him a bond of any character with reference to these show cases.

Q. Did you, as an individual, ever have any possession of these show cases that are the subject-matter of this action?

Objected to as incompetent, immaterial, and calling for a conclusion. Sustained. Exception.

Q. Were these show cases that are the subject-matter of this action ever in your possession as an individual?

Objected to, as before. Sustained. Exception.

152 To Mr. BARHITE:

I am an attorney and counselor-at-law and was in 1903. I am now and was then the law partner of Mr. Bailey, the attorney in this action. I went to the store on the 21st of August to take possession of those goods and whatever was there belonging to the Dodge Dry Goods Company, and met Mr. Dodge. And his version upon the stand of what occurred there was substantially correct, as I remember it—excepting in this particular, that Mr. Dodge, I believe, stated that the second conversation with me took place within a short time after the first conversation. My recollection of that is that it was several days afterwards. I am positive that it was some days afterwards, and I think it was quite a good many days afterwards.

Mr. Norton came downstairs when I notified Mr. Dodge that I had been appointed. He telephoned Mr. Norton, and he came down. Mr. Norton was sent for that same day. At that time I was not notified of these letters and this provisional agreement whereby the claim was made that The Century Mercantile Company owned these fixtures. I was notified several days afterwards. I can't fix it more definitely than that now. I made an arrangement with Mr. Dodge, at that time, to lease the store day by day. That was the day upon which I took possession.

That was one of the first things I did. I was ordered to do it by the United States Court. I did it under the orders of the court.

At that time, when I leased that store, I was not informed that The Century Company claimed that the fact that I was appointed receiver terminated the lease of the Dodge Dry Goods Company, or that a receiver was appointed by the Dodge Dry Goods Com-
153 pany terminated the lease. They didn't have to notify me of that. I knew that. I was the receiver of the Dodge Dry Goods Company. I didn't have to go on with their lease.

I did not know of this lease and this supplemental agreement, which was made in September, 1902, before I was appointed receiver. They didn't call my attention to it at all on that day. They called my attention to it several days afterwards. Then they made the claim to me that these fixtures belonged to them on account of the provisions of that agreement.

This demand was made upon me by the Hofman Company on the day that I was appointed receiver—not the day I was appointed, but the day I qualified, the 21st of August, 1903.

This demand is dated August 20th; the next day it was served upon me.

I did not ask Mr. Pierce upon what grounds they claimed title to these show cases.

Q. Did you make any investigation of the facts with regard to these show cases, after this notice was served upon you?

Mr. BAILEY: I object, as immaterial and irrelevant, because the receiver had absolutely no power to pass upon any question of title, and no power to surrender the possession of any property turned over to him, in the absence of the direction from court.

Received. Exception.

A. I turned the demand which was served upon me over to my attorney, Mr. Bailey, and told him what I had done with reference to it. I obtained his advice. I consulted either with Mr. Norton or Mr. Dodge with reference to the facts of the purchase of those
154 show cases. Mr. Bailey and I did together.

All of the correspondence and letters belonging to the Dodge Dry Goods Company was turned over to me; that is, they were in the building, but I didn't see them until a long time afterwards.

I believe I saw the contract at that time, but I didn't see the letters which had passed between the Hofman Company and the Dodge Dry Goods Company. The letters were there on file. I found afterwards, after the suit was commenced, then I started in to look that up.

From the time that this demand was served upon me, on the 21st of August, down to the 6th of October, nearly six or seven weeks later, I made investigations, as I told you. I saw a contract had been made and that the cases were delivered, and that they were there in the store, and that Mr. Dodge said they were all right. That is all I did with regard to it, until after the summons was served.

The inventory was made by the appraisers, who were appointed by the United States Court. I made the inventory in connection with the appraisers, and the appraisers fixed the price. I determined what property should be included and I did not include those show cases in my schedule, as receiver. That was done through some arrangement with Mr. Norton. It was finally decided not to put them in, on account of the claim made by The Century Company to these fixtures.

At the time I made this inventory, this demand had been made upon me by the Hofman Company. That was not the reason why they were not put in, that different parties were claiming them. I didn't consider that at all, because the claim made on me was made on me as receiver of the Dodge Dry Goods Company. That is the way it reads.

155 Q. If it was made upon you as receiver of the Dodge Dry Goods Company, you understood, of course, if the property didn't belong to the Dodge Dry Goods Company, you, as receiver, had no right to its possession, didn't you?

A. That is a pretty difficult question of law. I don't feel competent to answer without some investigation.

Q. You cannot answer the question?

A. I think there is some doubt about the question.

Q. Can you answer the question?

A. No, sir, I can't answer the question.

We started in to make the inventory shortly after I took pos-

session; I don't remember just when. I think they are here in court; I can refresh my recollection and tell you.

This lease that I made of the store was not a written lease. I leased it from day to day.

When this replevin was served upon me, I stated that I said to Mr. Stone, and I afterwards said to Mr. Baucus, that an order had already been served upon them restraining them from interfering.

Q. If that was true, why did you go again within three days and get another order restraining them?

A. I don't think I got any other order within three days.

These papers, the summons, I mean, were served on me on the 6th day of October, 1903. Then we did go and get an injunction particularly referring to this matter.

On the 9th day of October I got the other injunction, which was afterwards vacated. I did that because you commenced your suit against me individually, and the Century Company, and I claimed to hold that property merely as receiver of the Dodge Dry Goods Company, and I set those facts up in the petition to the court,
156 stating that they were part of the property of the Dodge Dry Goods Company, and that I held them merely in that capacity, and I asked for an injunction restraining you from prosecuting this action against me individually, and taking these fixtures.

No notice was given to the Hofman Company of the application for that. Not on the preliminary application, but — very soon after that order was served, an application was made by Hofman Company to vacate it.

Objected to upon the ground that the papers were the best evidence. Received. Exception.

That is my understanding of that—and argued before the United States District Court. I believe I didn't attend. I made the papers through my attorney, and that matter was not decided by the United States District Court until nearly a year later.

Objected to, upon the ground that the papers were the best evidence. Received. Exception.

I think it was finally decided about a year afterwards. There was an intermediate order. It was decided in October, 1904. Finally decided. There was an intermediate order. During that time I was using the show cases.

This Mr. Byron that bought these fixtures and show cases and other things is an attorney in Troy. He bought these show cases for my brother. That was the understanding. And they were immediately turned over to my brother, after the sale.

I am positive that I never, in any of the conversations with Mr. Baucus or Mr. Stone, said anything about re-bonding. Absolutely positive. I would not re-bond these fixtures as an individual.

157 To Mr. BAILEY:

At the time I took possession of this store, as receiver, August 21st, 1903, there were a great many details to look after and a great deal

to do. There were a great many things to be attended to, of course. It was a large business.

With reference to the receiver's inventory, I signed that as well as the appraisers. There were no fixtures included in that. None at all. All fixtures were left out, and that was because of the agreement made between my attorney and the attorney for The Century Company to submit the matter to the United States Court for determination. It is a fact that after this action was commenced, I made the petition to the United States Court and set forth the situation as it then existed, after the commencement of this action, in part because the sheriff questioned the effect of the order served upon him in August.

Q. I understood you to say, in answer to Mr. Barhite, that from October, 1903, down to October, 1904, you continued to use show cases and held possession of them as receiver; if you so answered, is that what you meant?

A. If I stated that I made a mistake in this, I held those show cases from the 21st of August, 1903, down to the 1st of December, 1903, as receiver, and then as trustee.

I ceased to be receiver at that time.

I think it was on or about that date.

To Mr. BARHITE:

None of the fixtures were included in my inventory. I left out of that inventory all of the fixtures of the character named in this lease of September, 1902, I think.

158 I don't know particularly what that refers to now, without looking at it, but I left out everything.

My recollection is that I left out everything that came under the terms of this lease. I think all the fixtures in the building and everything of that nature was left out.

All the fixtures which would come under my construction of this lease, I left out, I think.

The COURT: State whether, during the time you held these fixtures and refused to give them up, you did it purely as receiver?

A. Yes, sir; purely as receiver.

Q. In your capacity as receiver?

A. Yes, sir.

Mr. BAILEY: I offer in evidence, from the records of the United States Court, certified copy of an affidavit made by Edward Murphy, 2d, the one that is recited in the order which plaintiff has offered in evidence, filed October 10th, 1904.

Mr. BARHITE: I object to it, as incompetent and immaterial.

Sustained. Exception.

Paper marked Defendant's Exhibit No. 18, for identification.

(Defendant's Exhibit No. 18, for identification, is indicated in the above statement.)

Mr. BAILEY: I offer in evidence an order that was made in that court, November 10th, 1903, entered by Mr. Barhite, attorney for the plaintiff, together with a notice that is endorsed upon that order, ad-

dressed to H. D. Bailey, attorney for Edward Murphy, 2d, as receiver, and signed by Mr. Barhite, attorney for the plaintiff.

159 Objected to, as incompetent and immaterial. Sustained. Exception.

Paper marked Defendant's Exhibit No. 19, for identification.

(Defendant's Exhibit No. 19, for identification, appears at page 84, above.)

Mr. BAILEY: That order directed the receiver to serve a notice, and I offer that notice served by the receiver, pursuant thereto.

Objected to, as before. Sustained. Exception.

Paper marked Defendant's Exhibit No. 20, for identification.

(Defendant's Exhibit No. 20, for identification is indicated above.)

Mr. BAILEY: I offer in evidence certified copy of an order of the United States Court, appointing a trustee of the Dodge Company.

Paper marked Defendant's Exhibit No. 21.

Defendant's Exhibit No. 21 is the usual order, and appoints Edward Murphy, 2d, trustee of the Dodge Dry Goods Company, and was made by the Federal Court November 28th, 1903.

Mr. BAILEY: I offer certified copy of an order of the United States Court, approving the bond of the trustee.

Paper marked Defendant's Exhibit No. 22.

(Defendant's Exhibit No. 22 is the usual order approving trustee's bond.)

Mr. BAILEY: I call on the plaintiff to produce a notice of a meeting of the creditors of the Dodge Dry Goods Company, bear-

160 ing date November 9th, 1903, which was mailed to it about November 11th, 1903.

Paper produced by Mr. Barhite.

Mr. BAILEY: I offer in evidence a notice of the first meeting of the creditors of the Dodge Dry Goods Company, dated November 19th, 1903, and signed by the referee in bankrupcty, with proof of its mailing to the John Hofman Company.

Objected to, as incompetent and immaterial, and not proved. Sustained. Exception.

Paper marked Defendant's Exhibit No. 23, for identification.

Defendant's Exhibit No. 23, for identification, is the notice of the first meeting of the creditors of the Dodge Dry Goods Company, with proof of its mailing to the plaintiff on November 11th, 1903. Meeting called for November 27th, 1903.

Mr. BAILEY: I call on the plaintiff to produce an order made December 1st, 1903, by the United States Court, George W. Ray, judge, directing the receiver to turn over the property in his possession to the trustee, and containing, also, notice of a hearing of the court at which the accounts of the receiver will be passed upon.

Mr. BARHITE: I haven't any such paper.

Mr. BAILEY: I offer that order in evidence, with proof of its mailing to plaintiff.

Objected to, as incompetent and immaterial, and not proper proof of service. Sustained. Exception.

Order marked Defendant's Exhibit No. 24, for identification.

Proof of mailing marked Defendant's Exhibit 25, for identification.

161 Defendant's Exhibit No. 24, for identification, was an order made in the Federal Court December 1st, 1903, directing the receiver of the Dodge Dry Goods Company to turn over to the trustee all the goods and properties of the bankrupt in his possession and directing him to file an account and to serve notice by mailing the order by December 5th, 1903, to all the scheduled creditors of the bankrupt. And it further directed that objections, if any, to the accounts of the receiver be presented to that court on December 15th, 1903, at which time the accounts of the receiver were to be passed upon.

Defendant's Exhibit No. 25, for identification, shows mailing order, Exhibit 24, to the plaintiff on December 4, 1903.

Mr. BAILEY: I offer in evidence the certificate of the clerk of the District Court of the United States that the name of John Hofman Company, Rochester, N. Y., appears in the schedule of the creditors of the Dodge Dry Goods Company, as creditor to the amount of $4,000.

Objected to, as incompetent, immaterial and not binding upon the plaintiff in any way. Sustained. Exception.

Certificate marked Defendant's Exhibit No. 26, for identification.

(The contents of Exhibit No. 26, for identification, is shown above.)

Mr. BAILEY: I offer in evidence order of the United States Court, made March 1st, 1904, approving the accounts of the receiver and discharging him.

Objected to, as before. Sustained. Exception.

162 Paper marked Defendant's Exhibit No. 27, for identification.

Defendant's Exhibit No. 27, for identification, was an order made in the Federal Court March 1st, 1904; recites the above order of December 1st, 1903, Exhibit No. 24; the adjournments of the matter of the adjustment of the receiver's accounts. Recites the appearances. Does not show any appearances by this plaintiff. Approves the accounts of the receiver, which show the delivery of all the property in his hands to the trustee.

Mr. BAILEY: I have here certified copy of the judgment-roll complete in an action brought in the District Court of the United States by Edward Murphy, 2d, trustee in bankruptcy of the Dodge Dry Goods Company, against The Century Mercantile Company and James E. Dodge. I offer in evidence from the final decree made in that action September 6th, 1904, the following portion:

"That the lease, dated September 4th, 1902, made by James E. "Dodge to the Dodge Dry Goods Company, under its then name of "the Church-Dodge Co., was and is void, and that the unilateral "agreement made by the Dodge Dry Goods Co. under its then name "of Church-Dodge Co. to James E. Dodge, dated September 8th, "1902, was and is void, and that all the property claimed under "such an agreement by the defendants, — either of them, was and is "the property of this p-aintiff, who is entitled to the possession of the

"same for all the purposes of the trust of which he is trustee; such "property being all improvements, fixtures, counters, shelving, show "cases, cash system, soda fountain, machinery, appliances, parti-
"tions, railings, store fixtures and furniture erected, placed
163 "and ever owned by said Dodge Dry Goods Co. upon the prop-
"erty mentioned in said lease, and not a part of the realty, "subject to the liens existing on the pneumatic tube service.

"It is further ordered and decreed that the deed made by James "E. Dodge and wife to the Century Mercantile Co., dated March 5th, "1903, and recorded in Rensselaer County Clerk's Office, March 5, "1903, in Book of Deeds 288, page 160, be and the same hereby is "reformed by eliminating as grantee the party of the second part, "the words, 'Century Mercantile Co.' and inserting in the place and "stead thereof the words 'Dodge Dry Goods Co.' Upon the record-"ing in his office of a certified copy of this decree, the clerk of Rens-"selaer county is hereby ordered and required to make upon said "record of said deed a proper reference in respect thereto."

Mr. BARHITE: I object as incompetent, immaterial, and that the plaintiff is not a party to the action.

Sustained. Exception.

Paper marked Defendant's Exhibit No. 28, for identification.

Defendant's Exhibit No. 28, for identification, was the entire judgment-roll in the action above indicated. The material portion is indicated above.

Mr. BAILEY: I offer in evidence inventory that was taken by the appraisers, in the bankruptcy matter, that portion of it which includes these show cases, which are the subject of this action, dated September 13th, 1904.

Objected to, as incompetent and immaterial. Sustained. Exception.

164 Paper marked Defendant's Exhibit No. 29, for identification.

Defendant's Exhibit No. 29, for identification, was an inventory taken by the duly appointed appraisers of the Federal Court, and contains the same property, among others, which is described in the complaint.

Mr. BAILEY: I offer in evidence order of the bankruptcy court, made September 7th, 1904, directing a sale of the property by the trustee, including the property which is the subject of this suit, and directing a notice to be served upon all schedule creditors of the bankrupt for them to show cause, if any they had, upon October 10th, 1904, why the property shall not be sold.

Received.

Paper marked Defendant's Exhibit No. 30.

The material part of Defendant's Exhibit No. 30 appears at page 84, above.

Mr. BAILEY: I call on the plaintiff to produce a notice, bearing date September 7th, 1904, signed Edwin A. King, referee in bankruptcy, given pursuant to the order of Exhibit No. 30, just introduced in evidence.

I offer that notice in evidence, with certified copy of proof of its mailing.

Objected to, as incompetent and immaterial, and not proper proof. Sustained. Exception.

Mr. BAILEY: I propose to prove and show that that was mailed to the plaintiff in this action.

Paper marked defendant's Exhibit No. 31, for identification.

165 Defendant's Exhibit No. 31, for identification, was a notice signed by the referee of the Federal Court, dated September 7, 1904, to the scheduled creditors of Dodge Dry Goods Company, directing them to show cause, if any they had, at a hearing on October 10, 1904, why the property which is described in the complaint in this action and other property then in the hands of the trustee, should not be sold, with proof of mailing to the plaintiff on September 9, 1904.

Mr. BAILEY: I offer in evidence certified copy of the order made by the bankruptcy court, October tenth, on the return of the order to show cause, Exhibit No. 30, admitted in evidence.

Objected to, as before, and also as not binding upon the plaintiff. Sustained. Exception.

Paper marked defendant's Exhibit No. 32, for identification.

Defendant's Exhibit No. 32, for identification, is indicated at page 84, above.

Mr. BAILEY: I offer in evidence the terms of the sale under which the property, including the property mentioned in this action, was sold October 10, 1904, signed by the referee in bankruptcy, dated October 10, 1904.

Objected to, as before. Sustained. Exception.

Paper marked defendant's Exhibit No. 33, for identification.

Defendant's Exhibit No. 33, for identification, were the terms of sale, signed by the referee in bankruptcy, directing how the property described in the complaint should be sold.

166 Mr. BAILEY: I offer in evidence certified copy of the trustee's report of sale, dated October 10, 1904, made to the bankruptcy court.

Objected to, as before. Sustained. Exception.

Paper marked defendant's Exhibit No. 34, for identification.

Defendant's Exhibit No. 34, for identification, was the trustee's report to the Federal Court of the sale of the property, including that described in the complaint as that court had directed.

Mr. BAILEY: I offer in evidence certified copy of an order made by the bankruptcy court, October 10, 1904, confirming the trustee's report, and a sale, and directing a conveyance by him.

Objected to, as before. Sustained. Exception.

Paper marked Exhibit No. 35, for identification, for defendant.

Defendant's Exhibit No. 35, for identification, was an order of the Federal Court, approving the sale of said property.

Also, assignment made by the purchaser named in the trustee's report of sale to William E. Murphy, an assignment of bid.

Objected to, as before. Sustained. Exception.

Marked defendant's Exhibit No. 36, for identification.

Defendant's Exhibit No. 36, for identification, is indicated above.

Also, the conveyance made by the trustee to William E. Murphy, pursuant to the order of the bankruptcy court, dated October
167 10, 1904, and including, among other things, the chattels which are the subject of this action.

Objected to, as before. Sustained. Exception.

Paper marked defendant's Exhibit No. 37, for identification.

Defendant's Exhibit No. 37, for identification, is indicated in the statement above.

Mr. BAILEY: I have here a certified copy from the United States Court of the schedules in bankruptcy, filed by the Dodge Dry Goods Co., bankrupt, pursuant to the requirement of the bankruptcy act, and I offer in evidence from that portion of the schedules which names the creditors of the bankrupt that part which reads, "John Hofman Co., Rochester, N. Y., merchandise purchased, within 18 months at Troy, N. Y., no bond, judgment, bill of exchange, or promissory note; $4,000."

Objected to as incompetent, immaterial and irrelevant. Sustained. Exception.

Mr. BAILEY: I offer in evidence, the order which was made October 11, 1904, in this action, by James A. Betts, Justice Supreme Court, which has been heretofore marked Exhibit No. 77, for identification, staying the action by the sheriff.

Received.

Paper marked defendant's Exhibit No. 77.

(Defendant's Exhibit No. 77, appears at page 96, above.)

Also, an order made October 13, 1904, by Mr. Justice Betts, an order which denies the application contained in the last
168 order, and is made upon the application of the sheriff of Rensselaer county, appearing by James Farrell.

Received and marked Defendant's Exhibit No. 72.

(Defendant's Exhibit No. 72 appears at page 97, above.)

Also, certificate of the clerk of the county of Rensselaer, dated May 26, 1905, showing that Matthew A. Heeran never designated any place in the city of Troy as his office, as required by section 184 of the County Law.

Received. Marked Defendant's Exhibit No. 74, and is as follows:

"STATE OF NEW YORK, *County of Rensselaer, ss:*

"I, J. V. Jacobs, clerk of the county of Rensselaer, do hereby "certify that the terms of the County Court of the county of Rens- "selaer are held in the city of Troy, in said county, and in no "other city or town of said county; that Matthew A. Heeran was "duly elected sheriff of the county of Rensselaer for the term com- "mencing on the first day of January, 1901, and expiring Decem- "ber 31st, 1903, and that he duly qualified and entered upon the "discharge of his duties as such sheriff.

"I further certify that at the general election held in November, "1903, Victor M. Allen was duly elected sheriff of Rensselaer

"county for the term commencing January 1st, 1904, and expiring "December 31st, 1906, and that he duly qualified and entered upon "the discharge of his duties as such sheriff.

"And I further certify that I have made diligent search
169 "in my office for a notice of designation by the said Matthew "A. Heeran of the place where he kept an office as provided "in section 184 of the County Law and that I find no such notice "on file in said county clerk's office.

"In witness whereof I have hereunto set my hand and official "seal this 26 day of May, 1904.

"[L. S.] J. V. JACOBS, *Clerk.*"

Mr. BAILEY: I offer in evidence, from the statutes of the United States, chapter 3, sections 563, 564, 565, 566, 567, 568, 569, 570 and 571, prescribing the duties and the powers and the jurisdiction of the District Court of the United States.

Mr. BARHITE: The court takes judicial notice of those statutes.

The COURT: Yes, the court takes judicial notice of all statutes of the United States and of this State.

Offer withdrawn on that ruling.

Mr. BAILEY: It is admitted that the complaint in this action was not served until after October 17, 1904.

Mr. BARHITE: I don't remember the date. It was served right after that injunction. It was verified the 17th day of October, 1904, and certainly was not served before that day, but served shortly after that.

Mr. BAILEY: I offer in evidence, from an affidavit made by Mr. Barhite, the attorney for the plaintiff in this action, verified November 4, 1904, that part which reads as follows: "Immediately there-
"after instructions were given to the sheriff of Rensselaer
170 "county to take actual possession of said goods under said "writ of replevin. He attempted to take such possession "when one William E. Murphy, who claims to be the owner of said "goods under a sale to him in October, 1904, made an affidavit in "this action and procured an order from Mr. Justice Betts return-"able before the Trial Term, held in Rensselaer county on or about "the 12th day of October, 1904, to show cause why the sheriff should "not be restrained from interfering with said goods."

Also, from same affidavit, "That said defendant's claim in folio "11 of William J. Harper's affidavit on this motion, that said chat-"tels were replevied and taken from the possession of William E. "Murphy and from the building on the southwest corner of State "street, Troy, N. Y., where they had been since their delivery to "Dodge Dry Goods Company on the instigation of the plaintiff on "October 14, 1904, and that said chattels are still in the city of Troy, "N. Y., and defendants further claim in their said affidavit that "they desire the presence of six witnesses to prove these facts. "There is no doubt that said chattels were replevied at the time "stated, at the instigation of the plaintiff, under the writ of replevin "heretofore referred to."

Also, from said affidavit, "There is no question that after the de-

"fendant Murphy was appointed receiver that he was in possession "of the property of the Dodge Dry Goods Company as such re- "ceiver."

Objected to as incompetent and immaterial.

Sustained. Exception.

Mr. BAILEY: I offer from the affidavit of John Hofman, which was verified November 4, 1904, that portion which reads as fol-
171 lows: "I have fully and fairly stated all of the facts in this "case to the said attorney for the plaintiff, and am advised "by him after the consideration of such facts that the plaintiff has "a good and substantial cause of action on the merits against the "defendants in this action. I have fully and fairly stated to the "said attorney for plaintiff what the plaintiff will prove by each "and every one of the witnesses below named, and after such state- "ment and advice by said attorney and counsel, I verily believe that "the evidence and testimony of each of said witnesses is necessary "and material to the prosecution of this action by the plaintiff on "the trial herein, and that without the testiomny of each and "every one of said witnesses the plaintiff cannot safely proceed to "the trial of this action."

Also from the same affidavit, the following: "By Charles F. Hofman" * * * "the condition in which said show cases were at "the time they were taken from the possession of the defendants "by the ex-sheriff of Rensselaer County."

Objected to as incompetent and immaterial. Sustained. Exception.

Mr. BAILEY: Upon all the grounds to which objection was made to its admission in evidence, and upon the ground that the plaintiff has not shown that the defendant Murphy had any power at the time that the demand was made, to comply with it, I move to strike out Plaintiff's Exhibit No. 20, which has been offered in evidence, that is, the demand. I submit at that time it was not within his duty to surrender them to any person.

Motion denied.

Mr. Bailey excepted.

172 Mr. BAILEY: Upon all the grounds to which objection was made to its admission I move to strike out the order of the Federal Court, which was entered October 18, 1904, and which is Plaintiff's Exhibit No. 23; also, upon the ground that it was made subsequent to the time of the commencement of this action, and that the plaintiff cannot prove or rely upon anything to support his cause of action that was not in existence at the time the action was commenced; that it was made in a proceeding to which this defendant was not a party; that the court making it did not have jurisdiction in that it did not have possession of the property to which it refers, nor over the person of this defendant.

Motion denied. Exception.

Mr. BAILEY: I move, upon all the grounds to which objection was made to its reception, to strike Plaintiff's Exhibit 21, that portion of it which is the return of the sheriff, upon the ground that it was not proven to have been filed; that the evidence shows that the sheriff

never took possession, but that he abandoned possession to the receiver and therefore his replevin stated in that return became nugatory and void.

Declined. Exception.

Also, upon all the grounds upon which objection was made to its acceptance, I move to strike out the letter from Schwarzwaelder & Co. to the plaintiff, which I believe is Plaintiff's Exhibit No. 15, in which it is stated that Schwarzwaelder & Co. have assigned the contract to the Dodge Dry Goods Co., and upon the further ground that the plaintiff has failed to supplement the evidence contained
173 in that letter with evidence that is requisite to complete the proof of any assignment.

Declined. Exception.

Mr. BAILEY: I move upon all the grounds to which objection was made to its admission, to strike out the letter written by Mr. Dodge to the plaintiff, dated June 16, 1903, Plaintiff's Exhibit No. 17, and also upon all the grounds assigned by the court in refusing to admit the answer to the next succeeding letter of the Dodge Co., written by Mr. Barhite, attorney for the plaintiff, and which was offered by the defendant Murphy and marked Exhibit No. 50.

Declined. Exception.

Mr. BAILEY: I make the same motion with reference to a letter bearing date June 20th, written by Mr. Dodge to the plaintiff, and which is Plaintiff's Exhibit No. 18, upon the same ground.

Declined. Exception.

Mr. BAILEY: I again offer in evidence letter of Mr. Barhite, bearing date June 24, 1903, which was marked Defendant's Exhibit No. 50, for identification. I offer it as part of the *res gestae* of that transaction, as a communication made by the proven agent of the plaintiff, and as a part of the communications that were being exchanged at that time between the plaintiff and the Dodge Co.

Objected to. Sustained. Exception.

The defendant here rested.

Proofs closed.

174 Mr. BAILEY: On behalf of the defendant Murphy, I ask the court to direct a verdict for the defendant Murphy, upon the following grounds:

1. That the plaintiff has not established a cause of action against this defendant.

2. That the plaintiff has not shown itself the owner of the chattels.

3. That the plaintiff has not shown itself entitled to possession at the time of the commencement of the action, but has shown that the then present right of possession was in the United States Court.

4. That the plaintiff has not proven any demand on the defendant Murphy.

5. That the plaintiff has not shown that the property was in the possession of the defendant Murphy, but that it was in the possession of the United States Court.

6. That the plaintiff has not shown any wrongful taking by the defendant Murphy either individually or as receiver.

7. That the plaintiff has not shown any wrongful detention by Mr. Murphy either individually or as receiver.

8. That the plaintiff has shown that Mr. Murphy had no power to make delivery of the chattels in suit prior to this action.

9. That this court had no jurisdiction over the subject matter of this action, when it was commenced.

10. That no leave of the court having possession of these chattels is shown to bring this action prior to its commencement.

175 11. That it is not shown that the defendant had possession when the demand was made.

12. That the possession of the receiver was protected by court while he had possession, and even if later vacated, he is still to be protected by the orders in existence, while he was acting as receiver.

13. That it appears that Mr. Murphy could not have delivered this property to the plaintiff when such demand was made.

14. That the Dodge Company had in fact accepted the chattels, and the plaintiff has admitted and shown this fact by the introduction in evidence of the lease and collateral agreement, whereby it shows that the Dodge Company had exercised an act of ownership over the property, and the plaintiff had also shown the passage of title by demanding payment.

15. That having insisted on a sale until the time the receiver was appointed, the plaintiff cannot thereafter change his position.

16. That, holding the liability of Schwarzwaelder & Co. unsurrendered, and the order given by that company, it cannot maintain this action for the property.

17. That plaintiff has the property and that all there is left of this action on the pleadings is a claim of damages for $1,000, and that plaintiff has proved no damages, therefore there is nothing left in this case against the defendant Murphy, at this time.

The COURT: I have understood all along that you have conceded the value of the property?

176 Mr. BAILEY: Yes, sir; but the plaintiff has the property.

The COURT: Do you claim any damages in this case?

Mr. BARHITE: No, certainly not; we have abandoned that part of the case.

Mr. BAILEY: If the receiver, who is another person in law, held that property, and if the receiver did what he might lawfully do, in connection with holding that property, then certainly this individual cannot be held in damages.

The COURT: That is a perfect defense against him as an individual that he had a right to hold this property as receiver. Lawful possession on the part of the receiver is a complete defense to the action.

Mr. BAILEY: Having proven no damages and having possession of the property, why should they prosecute this action against the individual?

The COURT: They had to bring it against the individual.

Mr. BAILEY: They had the property before they served the complaint.

18. That if the United States Court retained jurisdiction certainly

until October 18, 1904, when the order which has been put in evidence was entered, and that up to the time the receiver's possession was certainly lawful.

19. That the plaintiff was a party to the bankruptcy proceedings, and is bound by the disposition that the Court made of this property in those proceedings.

177 20. That charging the goods was evidence of the sale upon credit, that a credit was extended.

21. That under the law, as interpreted by this court here, this court had no jurisdiction until after the order of October 18, 1904 was entered, and that up to that date the court was without jurisdiction, and the proceedings of the receiver and his possession was lawful.

22. That this property was lawfully in the possession of the bankrupt and was delivered by it to the receiver who then had a right to hold it until otherwise directed by the District Court of the United States.

23. That when the demand was made on the receiver, he had no knowledge of the details of plaintiff's claim, nor of the facts upon which defendant's claim of ownership is now predicated and knew of no reason why he should give it up.

24. That the property in the custody of the court is not subject to replevin, and seizure by the sheriff under such circumstances is void.

Mr. BAILEY: I suppose the same motion is made by the Century Mercantile Company, according to the understanding had this morning.

The COURT: From my recollection of the reading of those letters, I am inclined to deny the motion to direct a verdict.

Mr. Bailey excepted.

MR. BAILEY: Upon the same grounds, I move for a nonsuit upon all the evidence.

Motion denied. Exception.

178 Mr. BARHITE: I ask the court to direct a verdict for the plaintiff, upon the ground that it appears by the evidence that at the time of the commencement of this action, the plaintiff was the owner and entitled to the possession of the goods in question; and that after the demand upon the defendant, they were entitled to maintain this action.

Motion denied. Exception.

The COURT: That presents a question for the jury here, whether the title passed.

Counsel addressed jury.

The court charged the jury as follows:

Gentlemen of the Jury—The question for your determination here is, as to who shall be awarded the property in question, certain show cases. That will depend largely upon whether the title of this property had passed from the plaintiffs to the Church-Dodge Company, at the time when the bankruptcy occurred and the defendant Murphy was made receiver.

It appears that in January, 1903, the Hofman Co., the plaintiff

in this action, entered into an arrangement with Schwarzwaelder & Co., of New York for the manufacture and delivery of these cases. Subsequently the contract, by arrangement between Hofman and Schwarzwaelder and the Church-Dodge Co., was so transferred as to constitute a contract between the plaintiff and the Church-Dodge Co., and the plaintiff agreed to make the cases for the Church-Dodge Co., and the Church-Dodge Co. agreed to pay therefor under certain circumstances, after they came to be delivered. The plain-
179 tiff commenced the manufacture of the cases and for one reason and another some delay arose so that the time at first stated for delivery, the 15th of April, was extended to the twenty-second of April, I believe, and even then they were not done, and it was about the first of June before they were finally delivered. The cases were finally delivered at Troy, were set up and put in place by workmen furnished by the Hofman Co., and, as the Hofman Co. at that time claimed, satisfactorily and properly put in place. Following that the Hofman Co. asked for their pay for the cases, which was to be $4,000. We have two letters written by the Dodge Co. to the Hofman Co. to the effect that the delay was one that had exceeded the extension that had been given, that it caused great injury to their business and they had suffered great damage from it, and they would not accept the cases excepting, as they stated, conditionally, that their claims for damage shall be allowed. The Hofman Co. did not accede to the allowance of this damage, and there the matter stood until some time in August, when the Dodge Co. went into bankruptcy and Mr. Murphy, one of the defendants, was appointed receiver in bankruptcy for that company. Then it turns out that the Dodge Co. occupied the building of the Century Mercantile Co., and that in the lease of the Century Co. to the Dodge Co. there was a clause to the effect that in case of bankruptcy or insolvency the fixtures, particularly specifying show cases, should become the property of the owner of the building, the Century Mercantile Co. As the case then stood, Mr. Murphy was claiming this property as receiver of the Dodge Co., and the Century Co., under the clause in the lease to which I
180 have called your attention, was also claiming this property by reason of that agreement between it and the Dodge Co.

The money not having been paid for the cases, which had been in the possession of the Dodge Co. and installed in their place for about two months, the plaintiff at the time of the bankruptcy, undertook to say that it had a right to the cases, and it based its claim upon the ground that although it had undertaken the fulfillment of the contract, nevertheless, the Dodge Co., having refused to accept the cases, the title therefor had not passed and still remained in the Hofman Co.; that it would assert this claim of title and take the property itself, instead of attempting to collect the price for it. Whether it can do that depends upon the question as to whether the title to this property had actually passed to the Dodge Co. prior to this bankruptcy. Gentlemen, that is a question not free from difficulty. It is a question of fact to be submitted to you, and one upon which you are to pass upon the evidence which has been introduced in this case. Ordinarily, when a man enters into a contract for the manufacture

of property, and he fulfills the contract and delivers the property, the title to that property passes from him, and the person to whom it is delivered becomes the owner of it and responsible simply to pay for it. Now, the question here is, whether that was the condition of things at the time this bankruptcy occurred. If it was, if the title had passed, and the Dodge people had become the owners of this property, then your verdict must be for the defendants, because, if the title had passed, simply the question of creditor and debtor existed between the Hofman Co. and Dodge Co. Then the title having become vested in the Dodge Co. the only remedy
181 of the plaintiff would be to take its share in the division of the proceeds of the bankrupt estate. The plaintiff would be no better off than any other creditor who had trusted the Dodge Co. But it claims to be in better position, not because it failed to fulfill anything on its own part. Hofman claims to have fulfilled his contract. He claims to have made the goods properly, to have delivered them properly, and to have installed them properly, so that he would be entitled to recover the value of this property, if that was all there was of it. Instead of that he takes the position that there was a refusal on the part of the defendant to accept, so that it stopped the passing of the title to the defendant. That is the question for you to consider. If it did, so that the title remained in the plaintiff, then he had the right to take the course he did and take this property away, and your verdict must be for him.

The evidence upon which the plaintiff relies is the dissatisfaction expressed to him in these letters of the Dodge Co., which you have heard read and which have been commented upon so extensively by counsel. They said in those letters that they refused to receive these goods and they gave the reason for it. They said it was on account of delay, and they had specified some imperfections. With respect to these imperfections, if they were not of a substantial character, they would not prevent title passing. Where a man manufacturers goods under a large contract such as this if there should be some small imperfections in the course of manufacture, so that it was not an entirely perfect article in some small respects, still the title would pass, notwithstanding, and instead of preventing a collection of the money, it would be simply a matter of recoupment of
182 damages to the extent that the minor imperfection would warrant. If you should come to the conclusion that these imperfections were of very small moment and were insignificant in their character, that would not prevent the title to this property passing. The defendant would still be obliged to take this property; so that practically, for the purpose of this case, the grievance to be considered is the one relating to the failure of the plaintiff to deliver the goods within the time that he had agreed. He had agreed to deliver them some time previous to the first of May. I think the last extension was the twenty-sixth of April, if I remember rightly. Instead of that, he did not deliver them until about the first of June. The Dodge Co. after these goods were delivered and set up, complained in these letters that you have heard. They did not prevent the goods coming in and they did not undertake to stop the cases being set up

in their store. They did not even protest against the receipt of these cases and the setting up of them in their store. After having permitted that, although there was this delay, could these defendants subsequently say, when they were called upon to pay for these cases, "We do not accept them; we refuse to accept them"? Under those circumstances, and after they had permitted these cases to be set up in their store, can such a refusal as that effect a non-acceptance of these goods under the contract here? In their letter of March sixteenth, to Hofman & Co., Schwarzwaelder & Co. say, "Please pay to the order of John Hofman, Rochester, N. Y., $3,850 thirty days after completion, or two per cent. ten days, when they have delivered and
set up complete to your entire satisfaction, in your store at
183 Troy, N. Y., the glass show cases in accordance with contract and your floor plan in detail, approved by your Mr. James E. Dodge. This order supersedes the previous order of the Church-Dodge Co."

Hofman wrote to the Church-Dodge Co. as follows: "Enclosed please find order from Messrs. Schwarzwaelder & Co., directing you to pay us $3,850, when we shall have satisfactorily furnished you certain cases. Please acknowledge receipt of this order and advise us that you will honor same, and oblige. We are also in receipt of the correct floor plan from the Messrs. Schwarzwaelder & Co., which gives us all the information needed with regard to measurements, and we remain, yours, etc."

This letter says, "When we shall have satisfactorily furnished you with certain cases;" so that, unquestionably, the defendants were to receive show cases which were to be satisfactory. Now, then, were they satisfactorily furnished to these defendants under the stipulations of these letters? If these cases were made according to these contracts, if they were delivered to the defendant in substantial compliance as I have already instructed you, without defects, except such as were of an insignificant or minor character, they would be satisfactorily furnished, and the Dodge Co. would not have the right to say that they were not satisfactorily furnished by stating an objection that was without substantial foundation. If these cases were made and delivered substantially in the manner in which they were contracted to be made, and that is a question for you, then so far as
having satisfactorily furnished them is concerned, you must
184 find that that was done, notwithstanding they may have expressed a dissatisfaction with them, if that was without any foundation. Now, then, had they any right to refuse them on the ground of delay? It was a consideraable delay. It extended from the last of April, a delay of one month and perhaps a few days over. That is a delay, perhaps, they would have a right to complain of. They did complain of it, and they make that the substantial ground of their refusal to accept the cases. They stated in these letters very plainly that they did not accept them, but at the time they were put in they knew of the delay, and they did not at that time raise the objection, so far as we know. They permitted them to be put in and went on using them from that time, although continually stating in these letters that they refused to accept them. In other words,

they did take them, they did make use of them, and yet by protests from that time on, stated that they did not accept them. Gentlemen, was that an acceptance, or was that a refusal on the part of the Dodge Co. to take these goods? Now, if they were accepted, notwithstanding their statment that they did not accept them, if they were in fact taken and accepted, and used, then you may find that there was an acceptance of this property, and that the title to this property passed to the Church-Dodge Co., and if so, the defendant in this case is entitled to your verdict.

If you come to the conclusion that the defendants had substantial reasons for objecting to these cases, upon the ground that they were not properly finished or completed, and that this delay was of substantial character and of such extent, that although they did receive the cases temporarily, it was under protest and in such a way
185 that there was not an acceptance of them, then, gentlemen, the title failed to pass, and your verdict will be for the plaintiff.

When you come to find your verdict, I submit this to you as the form of your verdict: We award the chattels in dispute to ——, and you write in the plaintiff, or the defendant, according as you shall find.

Mr. BARHITE: I ask your honor to charge the jury, that in order to pass the title of the show cases from the Hofman Co. to the Dodge Dry Goods Co., there must have been an unconditional acceptance by the Dodge Dry Goods Co.

Declined.

Also, to charge the jury, that the basis of determining whether or not there was an acceptance of the show cases by the Dodge Co. must be the letters in evidence.

The COURT: They may consider those letters as one of the means of determining that question—as evidence upon that question. I decline to charge as requested.

Also, to charge that the return of the sheriff is conclusive evidence that the show cases were taken from the possession of the defendant.

Declined.

Also, to charge, that the fact that the sheriff left the show cases in the store, at the request of the defendants, in no wise prejudices the rights of the plaintiff.

The COURT: I so charge, that it in no way counts upon the issue left to the jury with respect to the possession and title of this property.

186 Also, to charge, if the goods were found in the possession of the defendant Murphy, and it is found that the plaintiff was the owner and was entitled to the possession of the show cases, that the action is properly maintained against the defendant Murphy as an individual, although he was the receiver of the Dodge Dry Goods Co.

The COURT: I so charge.

Mr. Bailey excepted.

Also, to charge, that if the Century Mercantile Co. made any claim

to the show cases under the lease and accompanying agreement, this action can be maintained against it.

So charged.

Mr. Norton excepted.

Also, to charge the jury, that if they find that the Dodge Dry Goods Co. never acquired title to the show cases in question, that the appointment of the defendant Murphy, as receiver, did not protect him in retaining possession of the goods after the demand had been served upon him by the plaintiff.

So charged.

Mr. Bailey excepted.

Mr. BAILEY: I except to the submission of any question to the jury. I also except to submitting to the jury the question as to who this property is to be awarded. The defendant Murphy makes no claim to this property in this action.

The COURT: Mr. Murphy does not wish the property awarded to him?

Mr. BAILEY: No, we do not ask it.

187 The COURT: Does anybody that you represent?

Mr. BAILEY: No, sir.

The COURT: Does the Century Mercantile Co.?

Mr. BAILEY: No, sir. The Century Mercantile was cut out of it by the United States Court.

The COURT: This property ought not to be sailing around without an owner. Why should not the jury be directed, under those circumstances, to award this property to the plaintiff?

Mr. BAILEY: Because we have been put to one thousand dollars damage and expense in coming here to defend this action. Because this defendant was sued for one thousand dollars and costs.

Mr. BARHITE: We have not made any claim for damages.

Mr. BAILEY: We had to meet it. That is what we were here for until to-day, when counsel announced there was no claim for damages. Mr. Murphy has incurred expense to the amount of one thousand dollars.

The COURT: Very well, I will change the direction with respect to that. I have not quite understood counsel about this matter. If counsel excepts to that and takes that position, I will direct that they find for the plaintiff.

Mr. Bailey excepts.

Mr. BAILEY: I ask on behalf of the defendant Murphy a direction for the dismissal of the complaint as to him, with costs. That would make some recompense for the expense we have been at. We have nothing to do with the present possession of the property.

188 The COURT: You relinquish all claims to the title and possession of the property?

Mr. BAILEY: Neither to title nor possession. We did not have possession and did not claim it, this individual did not at all. Now, the judgment to be rendered, as far as the defendant Murphy is concerned, is one of dismissal against the plaintiff, with costs. That is what I have asked, and that is all I ask.

The COURT: Do you claim it in his title of receiver?

Mr. BAILEY: We are discharged as receiver and make no claim as such.

The COURT: So you do not care to demand it in this action upon the ground of receivership?

Mr. BAILEY: Oh, no. We have nothing to demand as receiver; upon the ground of receivership we do not claim the property at all. I may say this to the court: Mr. Murphy asked when this demand was served upon him, for these people to apply to the United States Court for protection with reference to it, and they never done it. They cannot sue Mr. Murphy and get a judgment in an action against him. He did not have possession and never claimed possession. Mr. Murphy has not got the property and has no interest in it. He is here because he came here to defend himself against this claim of one thousand dollars and costs. If they had let up on that, he would never have had a word to say in this action.

The COURT: Did you put in your answer any claim for the property?

Mr. BAILEY: Any claim to ownership?

The COURT: Yes, sir.

189 Mr. BAILEY: We did not. I think in the demand for judgment there is a claim for the return of the property, but I submit we are not entitled to it, and we do not ask it at all.

The COURT: Then I shall certainly not submit that question.

Mr. BAILEY: We do not ask for the property, we ask for a judgment dismissing the complaint with costs, so far as the defendant Murphy is concerned.

The COURT: Can you also answer for the Century Mercantile Co. in that respect.

Mr. BAILEY: I know that is Mr. Norton's position.

The COURT: He has left you in charge of the case?

Mr. BAILEY: All he said is that he wished to have noted such objections and exceptions as we took. I think that will cover it.

The COURT: Then I think it will be safe to say to the jury that they award the property to the plaintiff.

Mr. Bailey excepted.

Mr. BAILEY: I do not see how you can determine that question in this action, and I cannot submit to any judgment with reference to that property here, because we are not in possession of it, and we do not claim possession. The judgment I ask and am entitled to is a dismissal of the complaint, as against us. Now, that does not affect the merits at all. We haven't any claim to it nor possession.

190 Mr. BARNITE: We are entitled to the direction of a verdict for the possession of this property if he doesn't care for it.

The COURT: Anything further to be said?

Mr. BAILEY: I have a very few exceptions to make. I except to that portion of your charge in which you say in substance, as I recollect it, that the Schwarzwaelder & Co. was eliminated from the contract for the construction of these go-ds. Also, to that portion of your honor's charge with reference to the letters of June sixteenth and June twentieth, which, as I recollect it, in substance states that the matter stood open from the time of the receipt of that letter of

June twentieth until August. I wish to call your attention, in a request to charge that on June twenty-fourth the plaintiff placed in Mr. Barhite's hands a claim of $4,000 against the company. I think that closed the transaction. It could not stand open until August, under those circumstances. Also, to except to so much of your charge as submits to the jury, as a question of fact, whether or not title passed, upon the assumption which the court stated as made that the plaintiff had fulfilled its contract, and to which no exception has been taken by the plaintiff. I except to so much of your charge as leaves any question to the jury as to that, and I ask the court to charge that upon such assumption of facts the Dodge Co. must be assumed to have accepted the property. Also, except to that portion of the charge in which any question as to a right to refuse acceptance when these letters were written, because of a failure to deliver at the time mentioned in the contract, is submitted to the jury, and on the contrary, I ask you to charge that all right
191 to make any objection to acceptance on that ground had been waived by the letters that are in evidence and by the permission accorded by the Dodge Co. to the plaintiff to install the goods in the store.

The COURT: I will submit that question to the jury.

Mr. Bailey excepted.

Also, to that part of the charge where you comment upon the order of March sixteenth, and the letter written in connection with it, upon the satisfaction that must be determined by the defendants. Also, to that portion of the charge wherein you say that the jury may find whether or not the retention of the show cases was of temporary nature.

Mr. BAILEY: I ask the court to charge that the continued use of the show cases from June 1, 1903, until the time of delivery to the receiver in bankruptcy was an unequivocal acceptance.

Declined. Exception.

Also, to charge that receipt, with intention to retain, is acceptance.

The court so charged.

Also, to charge that when these chattels passed into the possession of the bankruptcy court, the plaintiff, in so far as it was interested in these chattels and their price, became a party to the bankruptcy proceedings.

Declined as immaterial. Exception.

Also, to charge that Mr. Murphy the individual, and Mr. Murphy the receiver, are, in law, two distinct personages.

Declined. Mr. Bailey excepted.

192 Also, to charge that the burden is on the plaintiff to overcome the presumption incident to possession, and it must prove a present right of possession when the demand was made, and when this action was commenced in order to recover.

So charged.

Also, to charge that if this property, found by the receiver in the actual use and possession of the bankrupt, was in the actual possession of the receiver when this action was commenced, the plaintiff without a prior order of the bankruptcy court had then no present right of possession.

Declined. Exception.

Also, that it was the duty of the receiver to take possession of all property found in the use and possession of the bankrupt.

The court so charged.

Also, to charge that the receiver had no right nor power, as to any property which he found in the use or possession of the bankrupt and took into his possession, to determine any question of title or ownership, and no right nor power to make any surrender of any such property to any claimant without the direction of the court that appointed him.

Declined. Exception.

Also, to charge that upon the making of the contract of February 27, 1903, between the plaintiff William Schwarzwaelder & Co., William Schwarzwaelder & Co. became obligated to pay the contract price of everything mentioned upon delivery of the chattels mentioned at the place specified in the contract.

193 Declined, because of a transfer of the rights under the contract to other parties. Exception.

Mr. BAILEY: I except to that portion of the charge which in substance states that if the title did not pass then the plaintiff had a right to take the course which it did take and a verdict must be for it.

The COURT: I understand counsel for the defense to take the position that they make no claim to the property in question, and disclaim any contention for it, in their own behalf?

Mr. BAILEY: Yes, sir.

The COURT: Then, under those circumstances, I think the jury ought to be so instructed.

Mr. BAILEY: I think the court, taking into consideration the treatment of this defendant and the action brought against him, should direct a judgment here of a dismissal of the complaint as against this plaintiff, in favor of this defendant, with costs. Can we be put to all this expense and subject to this pending liability all for nothing at all?

The COURT: The only way you can succeed in the action is by contesting and having your contention allowed.

Mr. BAILEY: One of our contentions was, that we were not in possession of the property, did not claim it and were not proper parties to this action.

The COURT: The only question before this jury is whether this property shall be awarded to the plaintiff or the defendant. The other questions are subordinate questions submitted to the jury, and the ultimate decision of this jury means the awarding of

194 the property to either the plaintiff or to the defendant. Now, if the defendant disclaims any claim to this property, then I shall direct a verdict that the jury award this property to the plaintiff.

Exception.

Mr. BAILEY: We do disclaim any right to the property. We do not claim that we have any right to the possession of it. We do not ask it, but we do except to such a direction and to such a verdict and

to such a judgment. I do not believe that the plaintiff can make us parties defendant with reference to property that we have not possession of, had nothing to do with and get a judgment for costs against us. I do not think he has a right to make us a party at all.

The COURT: The only way to prevent that would be to insist that you have no claim upon it.

Mr. BAILEY: We asserted it in our answer, and set up there who did have the property, and gave them notice of it.

The COURT: A motion is made on the part of the defendant to dismiss the complaint as to the defendants in this action, that motion I deny.

Mr. Bailey excepted.

The COURT: Assuming, upon the statement of the defendant that they claim no right to a verdict for the possession of the property, or that it shall be awarded to the defendant, and there being no objection to the awarding of the property to the plaintiff——

Mr. BAILEY: I do except to the court making any award of the property to the plaintiff in this action, as against the defend-
195 ant Murphy, wherein the defendant Murphy was a party. We do not claim for the defendant any right or interest in any part of this property.

The COURT: You do not claim any awarding of the property to him by the jury?

Mr. BAILEY: We do not.

The court directed the jury to find a verdict awarding the property, the chattels in dispute in the action, to the plaintiff.

The jury found accordingly.

Mr. Bailey excepted.

Mr. BAILEY: Upon the minutes of the court, upon the exceptions taken, and upon all the grounds stated in section 999 of the Code, the defendant Murphy moves to set aside this verdict, and for a new trial, upon the ground that the same is contrary to law, contrary to evidence and against the weight of evidence.

Motion denied. Exception.

Mr. BAILEY: I suppose the court will consider the same motion made by the Century Mercantile Company.

Motion denied. Exception.

Mr. BAILEY: I ask for a stay of execution upon judgment for sixty days after entry and service of notice of entry of judgment, and I ask for a stay of ninety days, in case an appeal is taken, in which to make and serve a case on appeal.

Mr. BARHITE: I have no objection to that.

Stay granted accordingly.

196 At a Trial Term of the Supreme Court Held at the Court House, in the City of Rochester, N. Y., on the 1st day of June, 1905.

Present: Hon. James W. Dunwell, Justice Presiding.

JOHN HOFMAN CO., Plaintiff,
against
EDWARD MURPHY, 2D, and THE CENTURY MERCANTILE COMPANY, Defendants.

The above-entitled action having been tried at the above-named term of court before Hon. James W. Dunwell, Justice presiding, and a jury, and the court having directed a verdict awarding the return of the chattels in the dispute to the plaintiff, and the defendants having made a motion upon the minutes to set aside the verdict and to grant a new trial upon exceptions, and because the verdict was contrary to the evidence and contrary to the law,

Now, after hearing H. D. Bailey, Esq., of counsel for the defendants, in favor of said motion, and John A. Barhite, of counsel for the plaintiff, in opposition thereto,

Ordered, That the said motion for a new trial be and the same is hereby denied.

(Entered June 6, 1905.)

JAMES L. HOTCHKISS, *Clerk.*

197 At a Trial Term of the Supreme Court Held at the Court House, in the City of Rochester, on the 1st Day of June, 1905.

Present: Hon. James W. Dunwell, Justice Presiding.

JOHN HOFMAN CO., Plaintiff,
against
EDWARD MURPHY, 2D, and THE CENTURY MERCANTILE COMPANY, Defendants.

The above-entitled action having come on for trial at the above-named term of court before Hon. James W. Dunwell, Justice of the Supreme Court, and a jury, and the issues made by the complaint and the answers having been duly tried, and the court having directed a verdict awarding the chattels in dispute to the plaintiff, and the defendants having made a motion for a new trial upon the minutes of the trial judge, which said motion was duly denied,

Now, on motion of John A. Barhite, attorney for the plaintiff,

Adjudged that the possession of the chattels described in the complaint be and the same are hereby awarded to the plaintiff.

Further adjudged, that the plaintiff, John Hofman Company, do recover of the defendants, Edward Murphy, 2d, and the Century Mercantile Company, its costs and disbursements amounting to the

sum of four hundred fifty-eight dollars and sixty-three cents,
198 and that the plaintiff have execution therefor.

(Judgment entered June 15, 1905.)

JAMES L. HOTCHKISS, *Clerk.*

[Title.]

GENTLEMEN: Take notice, that the defendant, Edward Murphy, 2d, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the fourth judicial department, from the judgment rendered herein June 1st, 1905, and entered in Monroe county clerk's office June 15, 1905, and from every part of said judgment, and also defendant appeals from the order made herein June 1, 1905, and entered in Monroe county clerk's office June 6, 1905, denying defendant's motion for a new trial and from every part of said order, and that on the hearing of the appeal from said judgment said order will be brought up for review.

Dated July 11, 1905.

H. D. BAILEY,
Attorney for Defendant, Murphy,
Nos. 1 and 2 Keenan Building, Troy, N. Y.

To John A. Barhite, attorney for plaintiff; to the clerk of the county of Monroe.

199 [Title.]

GENTLEMEN: Take notice, that the defendant, the Century Mercantile Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the fourth judicial department, from the judgment rendered herein June 1, 1905, and entered in Monroe county clerk's office June 15, 1905, and from every part of said judgment, and also defendant appeals from the order made herein June 1, 1905, and entered in Monroe county clerk's office June 6, 1905, denying defendant's motion for a new trial and from every part of said order, and that on the hearing of the appeal from said judgment said order will be brought up for review.

Dated July 11, 1905.

JOHN T. NORTON,
Attorney for Defendant the Century Mercantile Company, City Hall, Troy, N. Y.

To John A. Barhite, attorney for plaintiff; to clerk of the county of Monroe.

[Title.]

RENSSELAER COUNTY, *ss:*

H. D. Bailey, being duly sworn, says, I am the attorney for
200 defendant Murphy in this action. No opinion in writing was rendered or made by the judge before whom this case was tried.

H. D. BAILEY.

Sworn to before me July 20, 1905.
MICHAEL F. O'CONNOR,
Notary Public.

[Title.]

I, James W. Dunwell, Justice of Supreme Court, before whom this action was tried, do hereby settle this case and exceptions herein on appeal as above contained, and I hereby certify that the foregoing case contained all the evidence given on the trial of this action and all proceedings had. I order portions of the evidence printed in *haec verba* as above contained, and the exhibits in part at length as above contained, and in part by summarizing statements as above set forth. I order the above case and exceptions to be filed and annexed to the judgment-roll herein. The foregoing is hereby ordered printed and filed.

Dated October 7th, 1905.

J. W. DUNWELL,
Justice Supreme Court.

201 *Minutes of Trial.*

At a Trial Term of the Supreme Court, Held in and for the County of Monroe, at the Court House, in the City of Rochester, State of New York, on the 29th Day of May, 1905.

Hon. James W. Dunwell, Justice Supreme Court, Presiding.

JOHN HOFMAN CO.
vs.
EDWARD MURPHY, 2D, and ANO.

John A. Barhite, Attorney for Plaintiff.
H. D. Bailey, Attorney for Defendant Murphy.
John T. Norton.

This cause having been moved by the plaintiff's attorney, was ordered to trial. The following named persons were called and sworn.

Jurors.

Edward B. Clarke, Francis P. Monaghan, James F. McGee, Christopher Biel, Thomas E. Marten, James S. Pace, Delos C.

Wright, Henry Blatter, Fred. R. Holt, Robert B. Tucker, Alfonso Whittleton, George A. Hicks.

Witnesses.

For plaintiff:

Alexander B. King, Jr., Edison E. Pierce, May 31; Andrew Stone, J. Erving Baucus, June 1; John T. Norton, May 31.

202 For defendant:

James E. Dodge, John A. Barhite, May 31; Edward Murphy 2d, June 1.

June 1st, by order of the court, the court directs a verdict awarding the chattels in dispute to the plaintiff. Motion to set the verdict aside on the minutes, exceptions and on all grounds contained in section 999 of Code, and that it is contrary to the weight of evidence. Denied. Stay of execution for 60 days after entry of judgment and 90 days to serve case and exceptions.

(Copy.)

H. O. WOODWARD,
Sp'l Dep. Clk.

Stipulated, That the foregoing copy clerk's minutes of trial, accidentally omitted from case on appeal, may be incorporated thereon as page 200A.

JOHN A. BARHITE,
Attorney for Plaintiff-Respondent.
H. D. BAILEY,
Attorney for Defendant Murphy.
JOHN T. NORTON,
Attorney for Defendant Century Mercantile Company.

203 [Title.]

Stipulated, that the foregoing is a true copy of the judgment-roll herein, of the notice of appeal and of all papers, and all evidence given, and of all proceedings had in this action. Clerk's certificate waived.

Dated October 14, 1905.

JOHN A. BARHITE,
Attorney for Respondent.
JOHN T. NORTON,
Attorney for Appellant Century Mercantile Co.
H. D. BAILEY,
Attorney for Appellant Murphy.

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, Commencing on the 2d day of January, 1906.

Present: Hon. Peter B. McLennan, Presiding Justice; Hon. Alfred Spring, Hon. Pardon C. Williams, Hon. Frank H. Hiscock, Hon. Edwin A. Nash, Associate Justices.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY,
Appellants.

The above-named Edward Murphy, 2d, and Century Mer-
204 cantile Company, the defendants in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the clerk of the county of Monroe on the 15th day of June, 1905, and from an order denying defendant's motion for a new trial, entered in said clerk's office on the 6th day of June, 1905; and the said appeal having been argued by Mr. H. D. Bailey, of counsel for the appellants, and by Mr. John A. Barhite, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby ordered that the judgment and order so appealed from be and they hereby are affirmed, with costs of this appeal in favor of the said respondent against the said appellants.

NEWELL C. FULTON, *Clerk*.

(All concur.)
(Seal.)
(Entered 19th day of January, 1906.)

Supreme Court, Monroe County.

JOHN HOFMAN CO., Plaintiff,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY,
Defendants.

The above-named defendants, Edward Murphy, 2d, and Century Mercantile Company, having appealed to the Appellate Division of the Supreme Court in and for the Fourth Judicial Depart-
205 ment from a judgment of the Supreme Court entered in the office of the clerk of the county of Monroe on the 15th day of June, 1905, and from an order denying defendant's motion for a new trial entered in said clerk's office on the 6th day of June, 1905, and the said appeal having come on to be heard,

Now, after hearing Mr. H. D. Bailey, of counsel, for the appellants and Mr. John A. Barhite, of counsel, for the respondent, and due deliberation having been had thereon,

Ordered and adjudged, that the judgment and order so appealed from be and they are hereby affirmed.

Further ordered and adjudged, that the plaintiff, John Hofman Co., do recover from the defendants, Edward Murphy, 2d, and Century Mercantile Company, the sum of $119.59, costs and disbursements of said appeal, as taxed, and that plaintiff have execution against said defendants therefor.

JAMES L. HOTCHKISS, *Clerk.*

(Entered January 19, 1906.)

RENSSELAER COUNTY, *ss:*

H. D. Bailey, being duly sworn, says I am attorney for the appellant, Murphy, herein; as I am advised by the clerk of the Appellate Division of the Fourth Department, there was no opinion in writing rendered or made by the Appellate Division herein.

H. D. BAILEY.

Sworn to before me January 22, 1906.

MICHAEL F. O'CONNOR,
Notary Public.

206 Supreme Court, Monroe County.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Appellants.

GENTLEMEN: The defendant, Edward Murphy, 2d, hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the clerk of the county of Monroe January 19, 1906, and from every part of said judgment. Said defendant also appeals from and intends to bring up for review on this appeal the order of affirmance made herein by the Appellate Division of the Supreme Court, in and for the Fourth Judicial Department, January 2, 1906, and entered in Monroe county clerk's office January 19, 1906, and appeals from every part of said order.

Dated January 22, 1906.

H. D. BAILEY,
Attorney for Edward Murphy, 2d, Appellant,
Nos. 1 and 2 Keenan Building, Troy, N. Y.

To John A. Barhite, Esq., Attorney for Respondent, and Clerk of Monroe County.

207

Supreme Court, Monroe County.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Appellants.

GENTLEMEN: The defendant, Century Mercantile Company, hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the clerk of the county of Monroe January 19, 1906, and from every part of said judgment. Said defendant also appeals from and intends to bring up for review on this appeal, the order of affirmance made herein by the Appellate Division of the Supreme Court, in and for the Fourth Judicial Department, January 2, 1906, and entered in Monroe county clerk's office January 19, 1906, and appeals from every part of said order.

Dated January 22, 1906.

JOHN T. NORTON,
Attorney for Century Mercantile Company, Appellant, No. 249 River St., Troy, N. Y.

To John A. Barhite, Attorney for Respondent, and Clerk of County of Monroe.

208

[Title.]

Stipulated, that the foregoing is a true copy of the judgment-roll herein, of the order and judgment appealed from, of the notices of appeal, and of all other papers, and of all evidence given, and of all proceedings had herein. Certificate of clerk waived.

Dated February 1, 1906.

JOHN A. BARHITE,
Attorney for Respondent.
H. D. BAILEY,
Attorney for Appellant Murphy.
JOHN T. NORTON,
Attorney for Appellant Century Mercantile Co.

209

Index.

	Page.
Answer of Murphy	13
Answer of Century Mercantile Co	17
Appearance on trial	20
Affidavit, no opinion	199
Affidavits of Barhite	169
Affidavits of Hofman	171
Baucus, direct	87
cross	90
Barhite	128
Cases satisfactory	121

Page.
Complaint 10
Contract, Schwarzwaelder & Co., with Hofman 26
Certificate of judge and order 200
Charge of judge 178
Contract, Schwarzwaelder & Dodge Co 117
Damages waived 176
Dodge 115
Demand on receiver. (Plaintiff's Exhibit 20) 53, 171
Demand on Century Mercantile Co. (Pl'ff's Ex. 19) 49
Estoppel 56, 81
Exhibits of Defendant Murphy:
No. 1. Petition in bankruptcy and affidavit 142
2. Order appointing receiver 61, 89, 143
3. Bond of petitioner 143
4. Bond of receiver 143
5. Order of October 6, 1903, continuing receiver .. 143
210
Exhibits of Defendant Murphy—Continued:
6. Bond continuing receiver 144
7. Petition of receiver for order, Oct. 9, 1903 144
8. Adjudication of Dodge Co., bankrupt 144
9. Order reference to King 144
11. Affidavit of Barhite, Oct. 31, 1903 ..... 80, 81
12. Affidavit of J. Hofman, Oct. 31, 1903 ..... 80, 81
13. Affidavit of Sherwood, Oct. 31, 1903 ..... 80, 82
14. Notice of motion for Nov. 10, 1903 ..... 80, 82, 145
15. Order of October 6, 1903, as to fixtures 145
17. Affidavit of J. Hofman, Nov. 23, 1903 ..... 80, 83
18. Affidavit of Murphy, Nov. 4, 1903 ..... 80, 83, 158
19. Order of Nov. 10, 1903, and notice 80, 83, 159
20. Notice served by receiver 81, 159
21. Order appointing trustee 159
21*a*. Sheriff's first return 8, 62
22. Approval of trustee's bond 159
23. Notice to Hofman Co. of creditors' meeting 160
24. Order for receiver to deliver to trustee 160
25. Proof of mailing order 160
26. Certificate, Hofman Co., scheduled as creditor ... 161
27. Order approving accounts of receiver 162
211
Exhibits of Defendant Murphy—Continued:
28. Judgment-roll, Murphy *vs.* Dodge 81, 84, 162
29. Inventory of trustee 81, 84, 164
30. Order of sale, Sept. 7, 1904 ..... 81, 84, 164
31. Notice of sale, Oct. 10, 1904 ..... 101, 164
32. Order of sale, Oct. 10, 1904 ..... 81, 84, 165
33. Terms of sale 165
34. Report of sale 81, 84, 166
35. Order confirming sale 81, 84, 166

Page.
36. Assignment of bid..... 166
37. Conveyance by trustee..... 167
39. Letter, plaintiff to Dodge Co., March 4, 1903.... 123
40. Letter, June 5, 1903, plaintiff to Dodge Co. 43, 44, 54, 119, 129
41. Invoice, bill for cases..... 55, 119
42. Letter, Dodge Co. to plaintiff, May 25, 1903.... 124
43. Telegram, plaintiff to Dodge Co., May 21, 1903.. 124
44. Letter, plaintiff to Dodge Co., May 25, 1903.... 125
45. Telegram, May 28, 1903, plaintiff to Dodge Co.. 125
Letter, plaintiff to Dodge Co., March 17, 1903... 126
50. Letter of Barhite, June 24, 1903..... 105, 130, 173
51. Letter of Barhite, July 14, 1903..... 106, 130
52. Letter of Barhite, August 12, 1903..... 107, 130
54. Contract, Schwarzwaelder and Dodge Co..... 117

212

Exhibits of Defendant Murphy—Continued:
55. Letter, plaintiff to Dodge Co., May 11, 1903.... 131
58. Letter, plaintiff to Dodge Co., June 18, 1903.... 129
68. Order of Oct. 13, 1904, Betts, J., Wm. E. M.... 69
70. Fee, bill of sheriff..... 99, 103
72. Order, Betts, J., Oct. 13, 1904, in this action 69, 97, 168
73. Clerk's certificate, no second return..... 9, 57
74. Certificate, Heeran, had no office..... 168
77. Order of Betts, J., Oct. 11, 1904..... 96, 167
Affidavit of Barhite..... 169
Affidavit of Hofman..... 171
Schedules in bankruptcy..... 167

Exhibits of plaintiff:
No. 1. Lease, Sept. 4, 1902, Dodge to Church-Dodge Co. 21
2. Lease, agreement, dated Sept. 8, 1902, Church-Dodge Co..... 23
3. Deed, March 5, 1903, Dodge to Century Mercantile Co..... 25
4. Order changing name to Dodge Dry Goods Co.. 26
5. Contract, Schwarzwaelder & Co., with John Hofman Co., Feb. 27, 1903..... 26
6. Letter, March 7, 1903, Dodge to plaintiff..... 28
7. Letter, March 10, 1903, Hofman to Dodge Co... 29
8. Letter, March 11, 1903, Dodge to plaintiff..... 31

213

Exhibit- of Plaintiff—Continued:
9. Order, March 16, 1903, by Schwarzwaelder & Co., to plaintiff, on Dodge Co..... 33
10. Letter, March 17, 1903, by plaintiff to Dodge Co. 34
11. Letter, March 16, 1903, by Dodge to plaintiff.... 35
12. Letter, March 18, 1903, by plaintiff to Dodge Co. 36

Page.

13. Letter, March 18, 1903, by Schwarzwaelder & Co., to plaintiff 38
14. Letter, March 19, 1903, by Dodge to plaintiff.. 34, 39
15. Letter, April 10, 1903, by Schwarzwaelder to plaintiff 40, 172
16. Letter, April 20, 1903, by Dodge to plaintiff.... 42
17. Letter, June 16, 1903, by Dodge to plaintiff 45, 83, 173
18. Letter, June 20, 1903, by Dodge to plaintiff.. 46, 173
19. Demand on Dodge 49
20. Demand on receiver..... 51, 147, 171
21. Affidavit, requisition, sheriff's return..... 9, 172
22. Order of October 9, 1903..... 60, 76
23. Order entered October 18, 1904..... 79, 90, 172
24. Order of January 28, 1905, amendment of return 85

Circular, not admitted..... 108

26. Letter, May 26, 1903, Dodge to plaintiff..... 112

214

Insurance 66
Inventory of receiver..... 81, 84
Judgment 197
Affirmance 204
Judgment, Murphy *v.* Dodge (Defendant's Exhibit 28).... 81, 84
King, direct..... 48
Lease, agreement of September 8, 1902..... 23
Letter of June 16, 1903, Dodge to plaintiff (Ex. 17)..... 45
Letter of June 16, motion to strike out..... 173
Letter of June 20, 1903, Dodge to plaintiff (Ex. 18)..... 46
Letter of June 20, 1903, motion to strike out..... 173
Letter of June 5, 1903, plaintiff to Dodge Co. (Defendant's Ex. 40)..... 43, 44, 119
Letter of June 5, 1903, authorized by plaintiff..... 54
Letter of Schwarzwaelder to plaintiff (Ex. 15)..... 40
Motion to strike out..... 172
Letter of Barhite, June 24, 1903 (Defendant's Ex. 50)..... 105
Offered again..... 130
Again offered..... 173
Letter, March 4, 1905, plaintiff to Dodge Co. (Defendant's Ex. 39) 123
Murphy 146
Motion for nonsuit, end of plaintiff's case..... 112, 116
Motion for nonsuit, end of case..... 174, 188
Notice of appeal, Murphy..... 198
Notice appeal, Murphy, Court of Appeals..... 206
Notice appeal, Century Mercantile Co..... 199
Notice appeal, Century Mercantile Co..... 207
Norton 104
Order of March 16, 1903, on Dodge Co..... 33
Not endorsed 126

Page.
Order appointing receiver (Plaintiff's Ex. 2) 61
Set out 89
215
Order denying new trial 196
Order of October 9, 1903 (Plaintiff's Ex. 22) 60, 76
Order entered October 18, 1904 (Plaintiff's Ex. 23) 80-89
Order, Appellate Division:
Order of Oct. 18, 1904:
Admission as to time of making 90
Motion to strike out 172
Order of November 10, 1903, and notice (Defendant's Ex. 19) 80, 83
Order of October 10, 1904, confirming sale (Defendant's Ex. 35) 81, 87
Ownership 124, 131, 133
Pierce, direct 50, 53
Cross 52, 54
Possession 60, 74, 81, 92, 111 147, 161, 157, 158, 170
Possession 176
Possession, Dodge, of cases 140
Rebonding 149
Requisition 8, 70, 98
Requisition (Plaintiff's Ex. 21) 8
Requests to charge 189
Summons 4
Sheriff's first return 8
Sheriff's second return 9
Sheriff's return (Plaintiff's Ex. 21) 9
Motion to strike out 172
Stone, direct 58, 75
Cross 60
Sheriff, Allen 103
Sheriff, other 103
Satisfaction with cases 121
Secrecy 65
Sherwood 119
Stipulation 208
Use of cases 129

216 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the first day of February, in the year of our Lord one thousand nine hundred and seven, before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge, presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur February 2nd, 1907.

217 JOHN HOFMAN CO., Respondent,
ag'st
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Appellants.

Be it remembered, that on the 6th day of February in the year of our Lord one thousand nine hundred and six, Edward Murphy, 2nd, and another, the appellants in this action, came here into the Court of Appeals, by H. D. Bailey and John T. Norton, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And John Hofman Co., the respondent in said action, afterwards appeared in said Court of appeals by John A. Barhite, its attorney.

Which said Notices of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

218 Whereupon, the said Court of Appeals having heard this cause argued by Mr. H. D. Bailey, for Appellant, Murphy, submitted for appellant, Century Mercantile Company, and argued by Mr. John A. Barhite of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellants' costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

219 Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the justices thereof, according to the form of the statute in such case

made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *February 2nd*, 1907.

I hereby Certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND, *Clerk.*

220 STATE OF NEW YORK:

COURT OF APPEALS, CLERK'S OFFICE.

I, W. H. Shankland, Clerk of the Court of Appeals of the State of New York, do hereby certify that the Court of Appeals did not write any opinion in rendering its decision in the case of John Hoffman Co., respondent, against Edward Murphy, 2d, and another, appellants.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Court, at the City of Albany, this 27th day of February, A. D., 1907.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk Court of Appeals.

221 Court of Appeals of the State of New York.

EDWARD MURPHY, 2D, CENTURY MERCANTILE COMPANY, Plaintiffs in Error,
against
JOHN HOFMAN CO., Defendant in Error.

Assignment of Error.

Now before the Justices of the Supreme Court of the United States of America, at the Capitol, in the City of Washington, come the said plaintiffs in error and respectfully submit, that in the record, proceedings, decision and judgment of the Court of Appeals of the State of New York, in this action, in that court entitled John Hofman Co. Respondent against Edward Murphy 2d. and Century Mercantile Company, Appellants, and say—assigning error therein—that in the record and proceedings in the aforesaid cause there is manifest error in this, to wit:

First. The Court erred in refusing to receive in evidence, when

offered by plaintiffs in error, the duly made orders, records and proceedings of the District Court of the United States in and for the Northern District of New York, sitting as a court of Bankruptcy, in the Matter of Dodge Dry Goods Company, Bankrupt, whereby said plaintiffs in error could have proven from the records of said Federal Court,

That at the several times when defendant in error made demand upon appellants in error for the chattels, which are the subject matter of this action, and at all times from August 19th,
222 1903, up to and including October 10th, 1904, said chattels were in the possession of said Federal Court, under its control and were disposed of pursuant and in obedience to its orders, in the Bankruptcy matter, wherein said John Hofman Co. had appeared and to which it was, of record, a party, and proving, by such excluded evidence, that at no time during said mentioned periods, did either of these plaintiffs in error have any possession, control over, or power of delivery or disposition of the chattels in suit.

The orders, records and proceedings of the said District Court of the United States, in and for the Northern District of New York, sitting as a Court of Bankruptcy, and entitled In the Matter of Dodge Dry Goods Company, Bankrupt, so erroneously excluded were, specifically, as follows:

Markings, Def't's Ex. for identification.

(*a*) Petition in Bankruptcy..... (Ex. No. 1)

This was a duly executed petition, showing all jurisdictional facts, filed Aug. 17, 1903. The trial Court said, "I will limit it to showing that there was a petition filed."

And in the same connection and marking, the affidavit of Charles L. Greenhall, made on application for receiver, showing all facts required by bankruptcy practice. Trial Court excluded its contents.

(*b*) Petition of Edward Murphy 2d., as receiver verified Oct. 8, 1903..... (Ex. No. 7)

This was the petition made by the receiver, to
223 the Federal Court, for directions in reference to chattels in suit, after this action was commenced against Murphy, individually, by service of Summons only, and is the petition mentioned in the order of Oct. 9, 1903, which plaintiff below had offered in evidence as its exhibit No. 22, and sets forth to the Court the facts of the receiver's possession of the chattels, found with bankrupt and its delivery of them to the receiver.

(*c*) Order made October 6, 1903..... (Ex. 15)

Reciting applications of receiver for directions of Court as to store fixtures, and directing receiver to hold possession pending appointment of trustee. Did not specifically mention these chattels, which were a part of the store fixtures, but did refer to the lease and agreement, which plaintiff below had put in evidence, its Exs. Nos. 1 & 2. This order and application were made by receiver prior to the commencement of this suit.

(*d*) Affidavit of Edward Murphy 2d. as receiver verified November 4, 1903, and filed Oct. 10, 1904.. (Ex. 18)

This was one of the affidavits recited in the order, made October 11, 1904, entered Oct. 18, 1904, (Ex. No. 23) offered by plaintiff below and received, and set forth the holding by the receiver under the order of the Federal Court.

(*e*) Order made November 10th, 1903..... (Ex. 19)

This was an order of said Federal Court made on motion of plaintiff below, directing Murphy, as receiver, to do certain things in reference, with these chattels, with a notice thereon signed by its attorney, and directed to the receiver's attorney.

(*f*) Notice by receiver..... (Ex. 20)

This was a compliance by the receiver with the order of Nov. 10, 1903, Ex. 19.

(*g*) Notice of Creditors' Meeting..... (Ex. 23)

This was due notice issued by the bankruptcy Court of first meeting of creditors of said bankrupt, with proof of service on John Hofman Co. A copy of it was produced by John Hofman Co.

224 (*h*) Order of December 1, 1903..... (Ex. 24)

This was an order directing Murphy, as receiver, to turn over all property in his hands to trustee, directing receiver to file accounts, and fixing time of filing objections thereto, and directing service of order upon a class which included John Hofman Co. With this was offered proof of its due service on John Hofman Co., which was also excluded. (Ex. 25)

(*i*) Order March 1, 1904..... (Ex. 27)

This was an order made on notice to John Hofman Co. approving the duly filed account of the receiver, which showed delivery of the property to trustee, and duly discharging him.

(*j*) Decree September 6, 1904..... (Ex. 28)

This was a decree of the District Court of the United States, in and for the Northern District of New York, duly rendered in a suit by Edward Murphy 2d. as Trustee in Bankruptcy of Dodge Dry Goods Company, bankrupt, against Century Mercantile Company, and James E. Dodge, among other things adjudging void the lease and agreement (Exs. 1 & 2) (of John Hofman Co.) and adjudging the chattels in suit to be the property of the trustee. Decree rendered while that Court was in possession of the chattels.

(*k*) Inventory ..... (Ex. 29)

This was the inventory duly taken Sept. 13, 1904, by the appraisers, pursuant to practice of the bankruptcy court, including therein the chattels in suit, then in possession of that Court.

(*l*) Notice of Sale, September 7, 1904..... (Ex. 31)

This was the due notice of the sale of this property signed by the Referee in Bankruptcy, and directing any objections thereto to be heard before that Court Oct. 10, 1904. This notice was produced by John Hofman Co. and was offered with proof of its due service on John Hofman Co.

(*m*) Order of Sale October 10, 1904..... (Ex. 32)

This was the order made on notice to John Hofman Co., and without objection on its part, for sale of these chattels.

225 (*n*) Terms of Sale of property in suit..... (Ex. 33)

Regular Terms by Referee in Bankruptcy, describing property in suit.

(*o*) Report of Sale..... (Ex. 34)

Made by Trustee showing sale of this property in compliance with terms of order of Federal Court.

(*p*) Order confirming sale, October 10, 1904..... (Ex. 35)

Confirms the sale, directs trustee to convey the property.

(*q*) Conveyance by Trustee..... (Ex. 37)

This was a conveyance pursuant to order of the Court.

(*r*) Schedules.

These were the regular schedules in bankruptcy showing John

Hofman Co. to be a creditor of Dodge Dry Goods Co. in the amount of $4000, the price of the chattels in suit.

Among others, the Court was in error in its specific rulings in the following instances:

(s) "Mr. BAILEY: Upon all the grounds to which objection was "made to its admission in evidence, and upon the ground that the "plaintiff has not shown that the defendant Murphy had any power "at the time that the demand was made, to comply with it, I move "to strike out Plaintiff's Exhibit No. 20, which has been offered in "evidence, that is, the demand. I submit at that time it was not "within his duty to surrender them to any person.

"Motion denied.

"Mr. Bailey excepted."

(t) In refusing to nonsuit John Hofman Co. on the 12th, 13th, 18th, 19th and 22nd grounds stated, to wit:

226 12th. "That the possession of the receiver was protected "by court while he had possession, and even if later vacated, "he is still to be protected by the orders in existence, while he was "acting as receiver.

13th. "That it appears that Mr. Murphy could not have delivered "this property to the plaintiff when such demand was made."

18th. "That if the United States Court retained jurisdiction cer- "tainly until October 18, 1904, when the order which has been put "in evidence was entered, and that up to the time the receiver's pos- "session was certainly lawful.

19th. "That the plaintiff was a party to the bankruptcy pro- "ceedings, and is bound by the disposition that the Court made of "this property in those proceedings."

22nd. "That this property was lawfully in the possession of the "bankrupt and was delivered by it to the receiver who then had a "right to hold it until otherwise directed by the District Court of "the United States."

(u) In charging the jury as follows:

"Also, to charge the jury, that if they find that the Dodge Dry "Goods Co. never acquired title to the show cases in question, that the "appointment of the defendant, Murphy, as receiver, did not protect "him in retaining possession of the goods after the demand had "been served upon him by the plaintiff.

So charged.

Mr. Bailey excepted."

(v) In refusing to charge, as requested by Mr. Murphy.

"Also, to charge that the receiver had no right nor power, as to "any property which he found in the use or possession of the bank- "rupt and took into his possession, to determine any question of "title or ownership, and no right nor power to make any surrender "of any such property to any claimant without the direction

227 "of the court that appointed him.

(w) In refusing to dismiss the complaint and in directing "verdict.

"The COURT: A motion is made on the part of the defendant to

"dismiss the complaint as to the defendants in this action, that "motion I deny."

"Mr. Bailey excepted."

"The court directed the jury to find a verdict awarding the prop- "erty, the chattels in dispute in the action, to the plaintiff.

"The jury found accordingly.

"Mr. Bailey excepted.

Second. The Court erred in holding the plaintiffs in error liable as for a tort, in failing to deliver property, which was then not in their power nor subject to their control nor to the control of either of them, but subject to the orders of the Federal Court and by that Court disposed of.

Third. The Court erred in holding that the Act of Congress commonly known as the Bankruptcy Act, was ineffectual to confer jurisdiction upon the Federal Court.

Fourth. The Court erred in holding that the plaintiffs in error could properly be convicted and punished as for a tort, for obedience to the duly made orders of the Federal Court.

Fifth. The Court erred in holding that plaintiffs in error were not protected by the provisions of the Federal Constitution, giving to Congress exclusive power to enact uniform laws on the subject of bankruptcy, and by the statutes made by Congress thereunder.

228 *Sixth.* The Court erred in holding that the judgment of the State Court in this action was not taking the property of plaintiffs in error without due process of law, in violation of the provisions of the fourteenth amendment of the Federal Constitution.

Seventh. The Court erred in holding that the State Court could sit as a court of review to pass upon the correctness of the orders and decree of the said Federal Court.

Eighth. The Court erred in holding that the plaintiff in error, Murphy, was answerable in the State Court for acts done by him as an officer of the Federal Court, in obedience to its duly made orders.

Ninth. The Court erred in rendering the judgment against the plaintiffs in error, instead of dismissing the complaint as against plaintiff in error, Murphy.

Tenth. The Court erred in failing to dismiss the complaint as against the plaintiff in error, Century Mercantile Company.

Eleventh. That in this action the plaintiff in error, Edward Murphy 2d, claimed immunity from prosecution, individually, in the State Court, for acts done by him as an officer of the District Court of the United States for the Northern District of New York, sitting as a court of Bankruptcy, in obedience to the orders of such Federal Court: He being the duly appointed and qualified receiver, and subsequently Trustee, in Bankruptcy, of the Dodge Dry Goods Company, bankrupt, and that for the reasons aforesaid the said Courts of the State of New York were without jurisdiction in this action, which claim of immunity was erroneously overruled and wrongfully denied by said State Courts, which refused to give

229 to the orders, proceedings and decrees of said Federal Court the force and effect to which they were entitled, and to which

judgment and decision the plaintiffs in error herein, hereby severally except and assign the same as error.

Wherefore, the said plaintiffs in error, Edward Murphy 2d, and Century Mercantile Company, severally pray that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that they may each be restored to all things which they have lost by the action and because of the said judgment and decision.

HERBERT D. BAILEY,
Attorney for Plaintiffs in Error,
1 & 2 *Keenan Building, Troy, N. Y.*

230 [Endorsed:] Court of Appeals, State of New York. Edward Murphy, 2d, and Century Mercantile Company, plaintiffs-in-error, against John Hofman Co., defendant-in-error. Assignment of errors on writ of error from Supreme Court of the United States to Court of Appeals of the State of New York. Herbert D. Bailey, Attorney for Plaintiffs-in-error, 1 & 2 Keenan Building, Troy, N. Y.

231 Court of Appeals of the State of New York.

JOHN HOFMAN CO., Plaintiff-Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY,
Defendants-Appellants.

To the Honorable the Supreme Court of the United States:

The petition of Edward Murphy 2d, and the Century Mercantile Company, the above named defendants, and appellants, respectfully shows; upon information and belief;

That Edward Murphy 2d, is a citizen of the United States of America; that the Century Mercantile Company is a business corporation organized under the laws of the State of New York; that the John Hofman Co. is a business corporation organized under the laws of the State of New York;

That in this action, on the 1st day of February, 1907, final judgment and decision was rendered in this action against your petitioners, in and by the Court of Appeals of the State of New York, the same being the highest court of Law or Equity in said State of New York, in which any decision herein can be had, and such judgment was on the 1st day of February, 1907, entered in the office of the Clerk of said Court of Appeals of the State of New York, where the record thereof as yet remains.

That in said judgment it was adjudged that plaintiff-respondent, recover of the defendants-appellants, your petitioners, the costs of appeal, and wherein also was affirmed in all things, a judg-
232 ment rendered in the Supreme Court of the State of New York, January 19, 1906, and that day entered in the office of the Clerk of said Supreme Court, of the State of New York, in and for said County of Monroe, upon an order and decision of the

Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, which last mentioned judgment adjudged that plaintiff-respondent recover of defendants-appellants, your petitioners, $119.59, and also affirmed in all things a judgment rendered by the Supreme Court of the State of New York, renderd June 1, 1905, and entered in the office of the Clerk of said Supreme Court of the State of New York, in and for the County of Monroe, June 15th, 1905, against defendants-appellants your petitioners, for $458.63 and adjudging as against said defendants-appellants, to said plaintiff-respondent, the possession of certain chattels, the subject of this action, of the value of $4000.00.

Said judgment of January 19, 1906, also affirmed an order made by said Supreme Court of the State of New York, June 1, 1905, entered in said Monroe County Clerk's office, June 6, 1905, denying the motion made by defendants-appellants for a new trial.

That this was an action in replevin for certain property which had been, long prior to the commencement of this action, October 6, 1903, delivered by plaintiff, on June 1, 1903, to Dodge Dry Goods Company, and on that day accepted and put into use by the Dodge Dry Goods Company and continued in the actual use and possession of said Dodge Dry Goods Company, without objection or protest from plaintiff, until August 21, 1903, when said chattels were delivered to Edward Murphy, 2d, as receiver in Bankruptcy of said Dodge Dry Goods Company.

233 That the gravamen of this action was the failure of your petitioner to deliver the property in suit to plaintiff at a time when it was in the possession and under the orders and jurisdiction of the United States District Court, in and for the Northern District of New York, sitting as a Court of Bankruptcy.

On August 17th, 1903, a petition was filed in the office of the Clerk of the United States District Court in and for the Northern District of New York, whereby involuntary bankruptcy proceedings were instituted against said Dodge Dry Goods Company. On August 18th, 1903, in that proceeding an order was duly made by said United States District Court, appointing Edward Murphy 2d. receiver in bankruptcy of said Dodge Dry Goods Co., fixing his bond at $200,000.00 and directing him, as such receiver, on qualification, and approval of his bond, to take possession of all the property, real and personal, of said Dodge Dry Goods Company. Said order contained, among other things, the following language.

"It is hereby ordered, that pending the return of this order "* * * said alleged bankrupt be, and it hereby is, enjoined and "restrained from making any transfer of any of its property, and "* * * all persons are enjoined and restrained from instituting "and from prosecuting any and all suits and proceedings in any "court against said alleged bankrupt, and against any of its prop-"erty. * * * Ordered, that Edward Murphy 2d., of Troy, N. "Y., be, and he hereby is, appointed temporary receiver of all the "property, real and personal, and rights of action and demands due "said alleged bankrupt with power to collect and receive same and "continue the business with the present employees." Directs him

to file a bond of $200,000. and petitioners to file a bond of $500.

And continues: "And on the filing of such bonds approved
234 "by the said referee, with the Clerk of this Court, said re-
"ceiver shall take immediate possession of all said property
"of said alleged bankrupt, and in carrying on and continuing the
"business may pay employees, insure the stock and arrange for the
"continuation of the lease of the premises, where the business is
"carried on, * * * and on filing bonds, such temporary re-
"ceiver is hereby vested with all the usual powers of a receiver."

That the bond of such receiver was duly approved and he duly qualified August 20th, 1903. That on August 21, 1903, Edward Murphy 2d. duly demanded of said Dodge Company all the property which by the terms of said order of August 18th, 1903, it was directed to deliver to him. That among other things, pursuant to said order, said Dodge Company delivered to such receiver, the chattels in suit in this action; That thereafter, on the same day, plaintiff demanded said chattels of such receiver, who referred plaintiff to said United States District Court, saying he could only act in reference to the property delivered to him, as ordered by that Court. Said Dodge Dry Goods Company was subsequently and on October 14th, 1903, duly adjudicated a bankrupt, by order duly made by said United States District Court, for the Northern District of New York, which had jurisdiction thereunto in the premises.

That on October 6, 1903, this action was commenced by the service of Summons, without a complaint, upon defendants.

That on October 9th, 1903, said United States District Court duly made an order enjoining any interference with the property in the hands of such receiver and enjoining the further prosecution of this action against this defendant, Edward Murphy 2d.

The complaint in this action was not served until October 17th, 1904. The answers of the defendants were served October 28th, 1904, which set up as a defence on behalf of the defendant,
235 Edward Murphy, 2d., the several orders and proceedings of the said Bankruptcy Court. Similar answer was interposed by the defendant, Century Mercantile Company.

The point of the defence by Edward Murphy 2d, was that everything done by him in reference to the chattels in suit, had been done, as an officer of said Federal Court, in obedience to its orders, and that he was not, for such acts, liable to punishment and deprivation of property in this suit in the State Court.

In support of such defence, the defendants offered in evidence, the duly made orders of said Federal Court, directing the disposition of said chattels, which the trial court refused to receive in evidence, as incompetent and immaterial, to each of which refusals the defendants-appellants, your petitioners, duly excepted.

Such orders and proceedings are specified in the assignment of Errors, submitted herein.

These excluded papers showed, as matter of record in said Federal Court, that every act of Edward Murphy 2d., in reference to the property in suit, from the time it came to the receiver's hands Aug. 21, 1903, until he, as Trustees, sold and delivered it October 10,

1904, paying the proceeds over to the bankrupt estate, where it was distributed, was done in strict obedience to the orders of the Federal Court and was ratified and confirmed by that Court. And that at the times when plaintiff made the demands upon your petitioners, on which are based this action, the property was in the possession of the said Federal Court, and under its jurisdiction.

That to the refusal to receive in evidence the said several orders and proceedings of the Federal Court, your petitioners duly took exception in each instance on the trial of the action in the State Court. That under the practise existing in the courts of the State of New York, the errors relied upon are not contained in
236 formal assignments of error, but are based upon exceptions taken at the trial, and appearing in the record.

The decision of the Supreme Court of the State of New York, and of the Court of Appeals of the State of New York, in effect holds and decides, in excluding the evidence above mentioned; that the orders of the Federal Court made in reference to property in its possession, at the time of the orders, and in the possession of the bankrupt at the time of bankruptcy, under claim of ownership, were incompetent and ineffectual to protect the officer of the Federal Court in obeying its orders.

This decision was a denial of the right of the Federal Court to exercise the powers given it under the bankruptcy act, approved July 1, 1898, as amended February 5, 1903.

It was a violation of the Federal Constitution, Art. 1, Sec. 8, "The "Congress shall have power * * * to establish * * * "uniform laws on the subject of Bankruptcies, * * *; To "constitute tribunals inferior to the Supreme Court; to make all "laws which shall be necessary and proper for carrying into execu- "tion the foregoing Powers and all other Powers vested by this "Constitution in the Government of the United States, or in any "Department or officer thereof."

And a violation of Art. 3, Sec. 2, of the Federal Constitution, defining the jurisdiction of the Federal judiciary.

"The judicial power shall extend to all cases in law and equity, "arising under this Constitution, the laws of the United States, "* * *."

This decision was taking the property of your petitioners without due process of law, in violation of the fifth amendment to the Federal Constitution, by subjecting them and especially your petitioner Edward Murphy 2d, to punishment, fine and expense by way of costs, for obedience to the orders of the Federal Court.

237 This decision was a violation of both the letter and spirit of Sec. 1, of the Fourteenth amendment to the Federal Constitution.

"No State shall make or enforce any law which shall abridge the "privileges or immunities of citizens of the United States; nor shall "any State deprive any person of life, liberty or property, without "due process of law."

The Trial Court took judicial notice of the Statutes of the United States.

That in this action your petitioner, Edward Murphy, 2d. claimed immunity from prosecution in the State Court for all acts done by him as an officer of, and in obedience to, the orders of said United States District Court, for the Northern District of New York, sitting as a Court of Bankruptcy under the Bankruptcy Act and the Federal Constitution.

That the decision herein has been against such claim of immunity, and has been in violation of your petitioner's rights.

That the points presented herein were presented to the several courts of the State of New York, where this cause has been on for trial, to wit, Supreme Court Trial Term; Supreme Court Appellate Division; and Court of Appeals.

That by the final judgment and decision of said Court of Appeals, manifest error has happened to the great damage of your petitioner, all of which appears in the record upon, and final order of, said Court of Appeals.

In that the said State Court refused to permit the introduction in evidence of the duly made orders of the Federal Court, in obedience to which, your petitioner, Murphy, did all that was done by him in reference to the subject matter of this action.

238 And in that the said State Court determined that the fact that he was acting in obedience to the duly made orders of the District Court of the United States, in and for the Northern District of New York, sitting as a Court of Bankruptcy, was no protection to your petitioner, Murphy, when sued as for a tort herein, because of obedience to such orders of the Federal Court.

Your petitioners further show that the said final decision and judgment of said Court of Appeals of the State of New York, was and is a final judgment, decision and determination in the highest Court of the State of New York, in which a judgment in said suit could or can be entered, and in which a decision in said suit could or can be had.

Your petitioners further show that a Federal question was made in said case, to wit, as hereinbefore set out, and that said final judgment and decision of the Court of Appeals of the State of New York, was repugnant to and in conflict with the laws of the United States, and the bankruptcy act of its Congress; and that said judgment and decision of said Court of Appeals of the State of New York, was contrary thereto, and to the Federal Constitution, and that a decision of said Federal question was necessary to the judgment rendered.

Assignment of error herewith submitted.

239 Wherefore, your petitioners present herewith an exemplified and stipulated transcript of the record of the Court of Appeals and of the Supreme Court of the State of New York, in said case, and pray that a writ of error to said Court of Appeals of the State of New York be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided, said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Court of Ap-

peals of the State of New York be reversed and the complaint dismissed, and your Petitioners will ever pray.

EDWARD MURPHY, 2D.,
CENTURY MERCANTILE COMPANY,
By JOHN T. NORTON,
Director and Attorney, Petitioners.

Dated Feb. 1st, 1907.

240 STATE OF NEW YORK, *Rensselaer County, ss:*

Edward Murphy 2d. and John T. Norton, being each duly sworn, each for himself says: That said Norton is one of the Directors and the attorney in the State Court above mentioned, of the above Petitioner, Century Mercantile Company; That said Edward Murphy 2d. is one of the petitioners herein; That the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

EDWARD MURPHY, 2D.
JOHN T. NORTON.

Severally sworn to before me this 1 day of Feb., 1907.
JAMES F. BYRON,
Notary Public, Rens. Co., N. Y.
HERBERT D. BAILEY,
Attorney for Petitioners, Troy, N. Y.

241 The writ of error as prayed for in the foregoing petition, is hereby allowed, as to defendant Edward Murphy 2nd only this 6 day of Feb'y 1907, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $1500.00
Dated at Albany, N. Y., this 6 day of Feb., 1907.

EDGAR M. CULLEN,
Chief Justice of the Court of Appeals of the State of New York.

242 [Endorsed:] Supreme Court of the United States. John Hofman Co., respondent, against Edward Murphy 2d and Ano., Appellants. Petition for Writ of Error. Herbert D. Bailey, attorney for petitioners, 1 & 2 Keenan building, Troy, N. Y.

243 Court of Appeals of the State of New York.

JOHN HOFMAN CO., Respondent,
against
EDWARD MURPHY, 2D, and CENTURY MERCANTILE COMPANY, Appellants.

The above entitled matter coming on to be heard, upon the petition of the Appellants for a writ of error from the Supreme Court of the United States, to the Court of Appeals of the State of New York;

and upon examination of said petition, assignment of error and the record in said matter, and desiring to give the petitioner, Edward Murphy, 2d, an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that a writ of error, on behalf of said Edward Murphy, 2d, only be, and is hereby allowed to the Court of Appeals of the State of New York, from the Supreme Court of the United States, and that the bond presented by the said petitioner, Edward Murphy, 2d, be, and the same is hereby, approved.

Dated, February 6th, 1907.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

244 [Endorsed:] Court of Appeals of the State of New York. John Hofman Co., respondent, *vs.* Edward Murphy, 2d, and Ano., appellants. Order allowing Writ of Error. Herbert D. Bailey, attorney for petitioners, Nos. 1 & 2 Keenan Building, Troy, N. Y.

245 Supreme Court of the United States.

EDWARD MURPHY, 2ND, Plaintiff in Error,
against
JOHN HOFMAN CO., Defendant in Error.

Know all men by these presents: That we, Edward Murphy, 2nd, as Principal, and the United States Fidelity & Guaranty Company, a corporation organized under the Laws of the State of Maryland, having its principal office at Baltimore, in State of Maryland, as Surety, are held and firmly bound unto John Hofman Co., in the full and just sum of $1500.00, to be paid to the said John Hofman Co., its certain attorneys, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 1st day of February, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, Lately at a Term of the Court of Appeals of the State of New York, in a suit depending in said Court, between John Hofman Co., Plaintiff, against Edward Murphy, 2nd, and Century Mercantile Company, Defendants, a decree and judgment was rendered against the said defendants, with costs of appeal, affirming a judgment of the Supreme Court of the State of New York, entered upon an order of the Appellate Division of said Supreme Court, in the Fourth Department, for $119.59, costs, which also affirmed a judgment in Supreme Court of the State of New York Trial Term, entered in
246 Monroe County, June 15th, 1905, for $458.63, costs, and relating to the plaintiff's possession of certain property, and the said Edward Murphy, 2nd, having obtained a writ of error and filed a copy thereof in the Clerk's office, of the said Court of Appeals, in the State of New York, to reverse the said decree and judgment in

the aforesaid suit, and the citation directed to the said John Hofman Co., citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof,

Now the condition of this obligation is such, that, if the said Edward Murphy, 2nd, shall prosecute said writ of error, to effect, and answer all damages, and costs, if he fail to make his plea good, then the above obligation shall be void, otherwise to remain in full force and virtue.

"EDWARD MURPHY, 2D." [L. S.]
[L. S.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By "EDWARD MURPHY, 2D,"
Attorney in Fact.

S'gned, sealed and delivered in presence of

——— ———.

STATE OF NEW YORK, *Rensselaer County, ss:*

On this 1st day of February, 1907, before me, the subscriber, personally appeared Edward Murphy, 2nd, to me well known, and known to me to be the same person described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same.

[L. S.] "CHARLES S. ALDRICH,"
Notary Public, Rensselaer County, N. Y.

247 *Judicial Affidavit, N. Y. (New).*

CITY OF TROY,
County of Rensselaer, State of New York, ss:

On this 1st day of February, 1907, before me personally appeared Edward Murphy, 2d, Attorney-in-fact of The United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the Laws of the State of Maryland, and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the city of Troy; that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; that he knew the corporate seal of said Company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by the order of the Board of Directors of said Company, and that he signed said instrument as Attorney-in-fact of said Company by like authority. And the said Charles S. Aldrich further said that he is acquainted with Edward Murphy, 2d, and knew him to be the Attorney-in-fact of said Company; and that the signature of the said Edward Murphy 2d. subscribed to the said instrument is the genuine handwriting of the said Edward Murphy 2d., and was thereto sub-

scribed by the like order of the said Board of Directors, and in the presence of him, the said Charles S. Aldrich.

"CHARLES S. ALDRICH,"
Notary Public.

At a meeting of the Board of Directors of The United States Fidelity and Guaranty Company, held at the office of the Company in the City of Baltimore, State of Maryland, on the 7th day of June 1905, at which was present a quorum of said Directors duly authorized to act in the premises, on motion it was unanimously

Resolved: That in pursuance of Section 811 of the New York Code of Civil Procedure, Edward Murphy 2d., — Attorneys-in-fact of The United States Fidelity and Guaranty Company for the County of Rensselaer in the State of New York, be and each of them is hereby authorized and empowered to sign, execute and deliver for and on behalf of this Company, any and all bonds or undertakings mentioned or referred to in said Section 811 of said Code, that may be given or required in any Court or legal proceedings in said Count-, or any other bonds or undertakings that may be given or required in any legal proceedings in said Count-; and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company, the same to be attested by either one of the said Attorneys-in-fact above named as occasion may require.

CITY OF TROY,
County of Rensselaer, State of New York, ss:

I, Edward Murphy 2d, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at Troy, N. Y., this 1st day of February, 1907.

[L. S.] "EDWARD MURPHY, 2D,"
Attorney-in-fact.

Statement.

The United States Fidelity and Guaranty Company.

Home Office: Baltimore, Md.

At the Close of Business June 30th, 1905.

Commenced Business August 1st, 1896.

Assets.		*Liabilities.*	
Real Estate	$404,286.56	Capital Stock Paid in Cash.	$1,700,000.00
Baltimore City, State and Municipal Bonds	1,667,008.81	Premium Reserve	1,122,841.76
United States Bonds	83,200.00	Reserve for Unadjusted and Resisted Claims	251,038.89
Railroad and Other Bonds.	127,050.00	Collateral Deposits	80,053.47
Bank Stocks	68,150.00	Surplus and Undivided Profits	347,517.90
Railroad Stocks	43,780.00		
Cash in Banks and Home Office	519,785.88		
Premiums due from Agents, Less Commissions	358,252.49		
Loans on Mortgages	11,600.00		
Loans on Collateral	38,518.50		
Advanced a/c Contracts Secured	119,046.34		
Interest Due and Accrued	31,595.99		
Due for Subscriptions Dep't Guaranteed Att'ys	29,177.45		
	$3,561,452.02		$3,501,452.02

CITY OF TROY,
County of Rensselaer, State of New York, ss:

Edward Murphy 2d, being duly sworn, says that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of June 30th, 1905, and that the financial condition of said Company is as favorable as it was when such statement was made.

"EDWARD MURPHY, 2D."

Subscribed and sworn to before me this 1st day of February A. D., 1907.

[L. S.]

"CHARLES S. ALDRICH,"
Notary Public, Rens. Co., N. Y.

248 SIR: Take notice of a bond, duly approved, of which the within is a copy, this day filed in the office of the Clerk of the Court of Appeals of the State of New York.

Dated February 7, 1907.

HERBERT D. BAILEY,
Attorney for Plaintiff in Error.

To John A. Barhite, Esq., attorney for defendant-in-error.

[Endorsed:] Supreme Court of the United States. Edward Murphy, 2nd, plaintiff in error, *vs.* John Hofman Co., defendant in error. Copy. Supersedeas Bond. $1500.00. Herbert D. Bailey, attorney for plaintiff in error, Nos. 1 & 2 Keenan Building, Troy, N. Y. I hereby approve the within bond and surety this 6th day of February, 1907. Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York.

249 Supreme Court of the United States.

EDWARD MURPHY, 2ND, and CENTURY MERCANTILE COMPANY,
Plaintiffs in Error,
against
JOHN HOFMAN CO., Defendant in Error.

Know all men by these presents: That we, Edward Murphy, 2nd, as Principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., as Surety, are held and firmly bound unto John Hofman Co., in the sum of $500.00, to be paid to the said obligee, its successors and assigns, to the payment of which sum, well and truly to be made, we bind ourselves and our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of February, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, The above named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above mentioned action, by the Court of Appeals of the State of New York.

Now therefore, The condition of this obligation is such, that, if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void, otherwise, to remain in full force and effect.

"EDWARD MURPHY, 2D." [L. S.]
UNITED STATES FIDELITY &
[L. S.] GUARANTY COMPANY,
By "EDWARD MURPHY, 2D,"
Attorney in Fact.

Signed, sealed and delivered in presence of

——— ———.

250 STATE OF NEW YORK, *Rensselaer County, ss:*

On this 1 day of Feb. 1907, before me, the subscriber, personally appeared Edward Murphy, 2nd, to me well known, and known to me to be the same person, described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same.

"CHARLES S. ALDRICH,"
Notary Public, Rensselaer County, N. Y.

251 *Judicial Affidavit, N. Y. (New).*

CITY OF TROY,
County of Rensselaer, State of New York, ss:

On this 1st day of February, 1907, before me personally appeared Edward Murphy, 2d, Attorney-in-fact of The United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the Laws of the State of Maryland, and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who being by me duly sworn, said: That he resided in the city of Troy; that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; that he knew the corporate seal of said Company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by the order of the Board of Directors of said Company, and that he signed said instrument as Attorney-in-fact of said Company by like authority. And the said Charles S. Aldrich further said that he is acquainted with Edward Murphy 2d, and knew him to be the Attorney-in-fact of said Company; and that the signature of the said Edward Murphy, 2d, subscribed to the said instrument is the genuine handwriting of the said Edward Murphy 2d, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said Charles S. Aldrich.

"CHARLES S ALDRICH,"
Notary Public.

At a meeting of the Board of Directors of The United States Fidelity and Guaranty Company, held at the office of the Company in the City of Baltimore, State of Maryland, on the 7th day of June 1905, at which was present a quorum of said Directors duly authorized to act in the premises, on motion it was unanimously

Resolved: That in pursuance of Section 811 of the New York Code of Civil Procedure, Edward Murphy 2d., — Attorneys-in-fact of The United States Fidelity and Guaranty Company for the County of Rensselaer in the State of New York, be and each of them is hereby authorized and empowered to sign, execute and deliver for and on behalf of this Company, any and all bonds or undertakings mentioned or referred to in said Section 811 of said Code, that may be given or required in any Court or legal proceedings in said County, or any other bonds or undertakings that may be given or required in any legal proceedings in said County; and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company, the same to be attested by either one of the said Attorneys-in-fact above named, as occasion may require.

CITY OF TROY,
County of Rensselaer, State of New York, ss:

I, Edward Murphy 2d., Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original Resolution.

Given under my hand and the seal of the Company at Troy, N. Y. this 1st day of February, 1907.

"EDWARD MURPHY, 2D.,"
Attorney-in-fact.

Statement.

The United States Fidelity and Guaranty Company.

Home Office: Baltimore, Md.

At the Close of Business June 30th, 1905.

Commenced Business August 1st, 1896.

Assets.		*Liabilities.*	
Real Estate	$404,286.56	Capital Stock Paid in Cash	$1,700,000.00
Baltimore City, State and Municipal Bonds	1,667,008.81	Premium Reserve	1,122,841.76
United States Bonds	83,200.00	Reserve for Unadjusted and Resisted Claims	251,038.89
Railroad and Other Bonds	127,050.00	Collateral Deposits	80,053.47
Bank Stocks	68,150.00	Surplus and Undivided Profits	347,517.99
Railroad Stocks	43,780.00		
Cash in Banks and Home Office	519,785.88		
Premiums Due from Agents, Less Commissions	358,252.49		
Loans on Mortgages	11,600.00		
Loans on Collateral	38,518.50		
Advanced a/c Contracts Secured	119,046.34		
Interest Due and Accrued	31,595.99		
Due for Subscriptions Dep't Guaranteed Att'ys	29,177.45		
	$3,501,452.02		$3,501,452.02

CITY OF TROY,
County of Rensselaer, State of New York, ss:

Edward Murphy 2d, being duly sworn, says that he is the Attorney-in-fact of The United States Fidelity and Guaranty Company; and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of June 30th, 1905, and that the financial condition of said Company is as favorable as it was when such statement was made.

"EDWARD MURPHY, 2D."

Subscribed and sworn to before me this 1st day of February A. D., 1907.

"CHARLES S. ALDRICH,"
Notary Public, Rens. Co., N. Y.

252 SIR: Take notice of a bond, duly approved, of which the within is a copy, this day filed in the office of the Clerk of the Court of Appeals of the State of New York.

Dated February 7, 1907.

HERBERT D. BAILEY,
Attorney for Plaintiff-in-Error.

To John A. Barhite, Esq., attorney for defendant-in-error.

[Endorsed:] Supreme Court of the United States. Edward Murphy, 2nd, and Century Mercantile Company, plaintiffs-in-error, *vs.* John Hofman Co., defendant in error, Copy. Bond on Application for Writ of Error. $500.00. Herbert D. Bailey, attorney for plaintiffs in error, Nos. 1 & 2 Keenan Building, Troy, N. Y. I hereby approve the within bond and surety this 6 day of Feb., 1907. Edgar M. Cullen, Chief Justice of the Court of Appeals of the State of New York.

253 The originals of the foregoing bonds were lodged with the Clerk of the Court of Appeals of the State of New York on the 7th day of February, 1907, and the following indorsements made thereon:

"Bond Filed February 7th, 1907."

W. H. SHANKLAND,
Clerk Court of Appeals.

254 THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the suit between John Hofman Co., Plaintiff, against Edward Murphy 2d, and Century Mercantile Company, Defendants, wherein was drawn in question the validity of a statute of, and an authority exercised un-er, the United States; and the decision was against their validity; and wherein was drawn in question the validity of an authority exercised under the laws and judicial practice of said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such, their validity; and wherein was drawn in question the construction of a clause of the Constitution and Statutes of the United States, and of a commission held under the United States, and the decision was

against the right, privilege, exemptions and immunity, specially set up and claimed under such constitution, statute and commission: a manifest error hath happened to the great damage of the said Edward Murphy 2d and Century Mercantile Company, as by their said petition appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the said Edward Murphy 2nd aforesaid, in this behalf

255 Do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all thing- concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States, should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America the eighth day of February in the year of our Lord, one thousand nine hundred and seven.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

A. H. DOOLITTLE,
Clerk of the Circuit Court of the United States
for the Northern District of New York.

Allowed as to said Edward Murphy 2d by
EDGAR M. CULLEN,
Chief Justice of the Court of Appeals
of the State of New York.

256 [Endorsed:] Supreme Court of the United States. Edward Murphy, 2d, plaintiffs-in-error, against John Hofman Co., Defendant-in-error. Writ of error. Herbert D. Bailey, attorney for plaintiff-in-error, Nos. 1 & 2 Keenan Bldg., Troy, N. Y. Filed Feb'y 7, 1907. W. H. Shankland, Clerk Court of Appeals.

257 Supreme Court of the United States.

EDWARD MURPHY, 2ND, Plaintiff in Error,
vs.
JOHN HOFMAN COMPANY, Defendant in Error.

UNITED STATES,
County of Monroe, City of Rochester, ss:

Charles B. Clancy of the City of Rochester, N. Y., being duly sworn, says he is over twenty-one years of age, that deponent personally served the annexed citation, copy of petition for writ of error, assignment of error, order allowing writ, citation and writ and notice, cost bond and supersedeas bond and notices of filing endorsed

on said papers in the above entitled action on John A. Barbite, attorney for the defendant in error at Rochester, N. Y., on the 13th day of February, 1907, by delivering to and leaving with said John A. Barbite, personally, true copies of said citation, copy of petition for writ of error, assignment in error, order allowing writ, citation and writ and notice, cost bond, and supersedeas bond, and notices of filing endorsed on said papers; and deponent of his own knowledge personally knew the attorney so served to be the same attorney mentioned in said citation, writs, orders, etc., as attorney for the defendant in error.

And deponent further says he personally knew said John A. Barbite to be attorney for said defendant in error.

CHARLES B. CLANCY.

Sworn to before me, this 13th. day of February, 1907.

[Seal of Erwin S. Plumb, Notary Public, Monroe County, N. Y.]

ERWIN S. PLUMB,
Notary Public.

258 Supreme Court of the United States.

EDWARD MURPHY, 2ND, Plaintiff in Error,
vs.
JOHN HOFMAN COMPANY, Defendant in Error.

UNITED STATES,
County of Monroe, City of Rochester, ss:

Charles B. Clancy of the City of Rochester, N. Y., being duly sworn says he is over twenty-one years of age; that deponent personally served the annexed citation in the above entitled action on John Hofman Company, defendant in error, at Rochester, N. Y., on the 12th day of February, 1907, by delivering to and leaving with John Hofman, a director and president of said John Hofman Company, the defendant in error, personally, a true copy of said citation, and deponent of his own knowledge personally knew the corporation so served to be the same corporation mentioned and described in the said citation, as defendant in error therein, and the said John Hofman to be a director and president thereof.

CHARLES B. CLANCY.

Sworn to before me, this 13th day of February, 1907.

[Seal of Erwin S. Plumb, Notary Public, Monroe County, N. Y.]

ERWIN S. PLUMB,
Notary Public.

259 UNITED STATES OF AMERICA, *ss:*

To John Hofman Co.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Court of Appeals of the State of New York, wherein Edward Murphy 2d, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, this 6th day of February, 1907.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

260 [Endorsed:] Supreme Court of the United States. Edward Murphy, 2d., Plaintiff in error, against John Hofman Co., defendant in error. Citation. Herbert D. Bailey, attorney for plaintiff in error, 1 & 2 Keenan Bldg., Troy, N. Y.

261 UNITED STATES OF AMERICA:

Court of Appeals of the State of New York.

In obedience to the Commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Court, at the City of Albany, this 27th day of February, A. D., 1907.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND,
Clerk Court of Appeals.

Endorsed on cover: File No. 20,599. New York court of appeals. Term No. 248. Edward Murphy, 2d, plaintiff in error, *vs.* John Hofman Co. Filed March 2d, 1907. File No. 20,599.

Supreme Court of the United States

EDWARD MURPHY, 2D. Plaintiff in Error, *vs.* JOHN HOFMAN COMPANY, Defendant in Error.	October Term, 1907. No. 248.

BRIEF FOR PLAINTIFF IN ERROR.

This action is brought into this Court by writ of error to the Court of Appeals of the State of New York.

The questions sought to be presented on this review, relate to the right to immunity from personal prosecution in a State Court, for acts committed by one acting as an officer of the Federal Court, in obedience to the orders of the Federal Court. The jurisdiction of the Federal Court under the Bankruptcy Act, and the effect to be given to orders of the Federal Court (See Assignment of Errors, pages 119-125.)

FACTS FROM THE RECORD RELEVANT TO THE FEDERAL QUESTIONS HERE PRESENTED.

Involuntary proceedings in bankruptcy were instituted against Dodge Dry Goods Company, in the United States District Court, for the Northern District of New York (p. 78), and in that proceeding, on August 18th, 1903, an order was made by the Federal Court appointing Edward Murphy, 2d, Receiver. (P. 48.) The material part of the order is as follows:

"It is hereby ordered, that pending the return of this order "... said alleged bankrupt be, and it hereby is, enjoined and "restrained from making any transfer of any of its property, "and ... *all persons are enjoined and restrained from in-* "*stituting and from prosecuting any and all suits and proceedings* "*in any Court against said alleged Bankrupt and against any of* "*its property.* ... Ordered, that Edward Murphy, 2d, of "Troy, N. Y., be, and he hereby is, appointed temporary re- "ceiver of all the property, real and personal, and rights of "action and demands due said alleged bankrupt with power to

"collect and receive same and continue the business with the "present employees." Directs him to file a bond of $200,000, and petitioners to file a bond of $500. And continues: "And "on the filing of such bonds approved by the said referee, with "the clerk of this Court, said receiver shall take immediate posses- "sion of all said property of said alleged bankrupt, and in carry- "ing on and continuing the business may pay employees, insure "the stock and arrange for the continuation of the lease of the "premises, where the business is carried on, . . . and on "filing bonds, such temporary receiver is hereby vested with all "the usual powers of a receiver."

The subject-matter of this action was certain show cases of the value of $4,000. They were in the actual use and possession of the bankrupt, at the time of the appointment of the receiver, and were delivered to him as a part of the bankrupt's property. Defendant in error wrote the bankrupt as follows (p. 23):

"ROCHESTER, N. Y., *June* 5, 1903.

"The Dodge Dry Goods Co., Troy, N. Y.

"GENTLEMEN: Mr. Sherwood has returned and reports the "cases completely and satisfactorily set in place Tuesday night, "and we herein enclose invoice for same, and remain,

"Yours very truly,

"JOHN HOFMAN CO.,
"By PIERCE."

"Enclosure."

The enclosure was as follows (p. 29):

"Paper marked Defendant's Exhibit No. 41, for identification, "as follows (on bill-head of John Hofman Co.):

"ROCHESTER, N. Y., *June* 2, 1903.

"Sold to The Dodge Dry Goods Co.

"Order No. 4843. Shipped via Troy, N. Y.

"Terms, 30 days, or 2% for cash in ten days.

"314 foot of Show cases as per plans, specifica- "tions and contract	$3,850 00
"3 Cases around the posts	150 00
	$4,000 00"

Mr. NORTON, a witness for John Hofman Co., testified (p. 57): "During this year of 1903, I had my office in this building, in

"the upper story. The store was in the lower stories. I was "often in the store. I saw these show cases that form the subject- "matter of this action, in that store during the months of June, "July and August. They were in use by the dry goods company.

(Page 58):

"Q. Were you in the store often during the months of August, "September and October, subsequent to the appointment of the "receiver? A. Yes, sir.

"Q. Were these show cases, during all that time, in the posses- "sion of the receiver, and in use by him in the conduct of the "business? A. They were."

Mr. DODGE, President of the Bankrupt, testified (p. 72):

"I recollect the occasion on or about the twenty-first of August, "when Mr. Murphy called at the store and notified me that he "had been appointed receiver.

"He told me that the United States Court had made him re- "ceiver of all the assets of the Dodge Dry Goods Company.

"He demanded possession of them, showing order appointing "him, or a copy of it. In connection with that I gave him posses- "sion of the assets.

"The property that I gave him possession of at that time was "merchandise and fixtures in the store, also supplies and book "accounts; and among the things I turned over to him were in- "cluded these show cases that are the subject of this action. There "was no exception made of the show cases. . . .

"I handed him the keys of the store and told him its contents "were the property of the Dodge Dry Goods Company. And "these show cases were part of the contents at that time."

The RECEIVER testified (p. 81):

"The show cases that are the subject of this suit, when I took "possession, were on the ground floor of the Dodge Dry Goods "Company building, and the goods were in them, when they "were turned over to me as receiver. They were all filled with "goods."

(Page 82): "I took possession of these show cases as receiver "of the Dodge Dry Goods Company."

(Page 87): "The Court: State whether, during the time you "held these fixtures, and refused to give them up, you did it "purely as receiver?

"A. Yes, sir; purely as receiver.

"Q. In your capacity as receiver? A. Yes, sir."

Mr. BARHITE, attorney for Hofman Co. also stated in the record (pp. 93, 94):

"There is no question that after the defendant Murphy was "appointed receiver that he was in possession of the property of "the Dodge Dry Goods Company as such receiver."

After the Receiver had taken possession the Hofman Company demanded these show cases of the *Receiver* (p. 27):

"Edward Murphy, 2d, Receiver, etc., of Dodge Dry Goods Com-
"pany, Troy, N. Y.

"SIR: The John Hofman Company, a domestic corporation, "hereby demands possession and delivery from you of certain "show cases and store fixtures heretofore in the possession of "said Dodge Dry Goods Company, an alleged bankrupt, which "show cases and store fixtures are more particularly described in "schedule A hereto annexed and made a part hereof.

"Dated, August 20, 1903.

"Yours, etc.,

"JOHN HOFMAN CO.,
"By JOHN HOFMAN, *Prs.*

"[L. S.]

"(Schedule A, referred to, contained a description of the prop-"erty described in the complaint.)"

The Receiver's reply to the demand was his inability to act on the demand (p. 81):

"The demand that was made upon Murphy, as receiver, I "recollect the time when that paper was delivered to me, or a "copy of it. At that time I said that I held all these goods as "receiver of the Dodge Dry Goods Company, and that I couldn't "deliver them to any person without instructions from the United "States Court, and I suggested to the person who served them "upon me that application be made to the court for instructions "for the receiver."

The foregoing are the facts as to bankrupt's possession and delivery to the receiver:

There is not a word in the record in contradiction thereof. (The voluminous record here was printed at the instance of defendant in error, and contains a great mass of matter which is utterly irrelevant to the questions here presented for review; and we wish to state here that we are not responsible for this cumbersome record.)

On October 6th, 1903, this action in replevin was commenced against Mr. Murphy, individually, notwithstanding, and in utter disregard of the injunction order of August 18th, 1903 (p. 48), which the trial court would not let us then put in evidence (p. 82). It was not commenced against the receiver. When this action was commenced, the receiver submitted the matter to the Federal Court, which on October 9th, 1903, made another restraining order, which the trial court permitted Hofman Co. to place in evidence (p. 41). The trial court refused to let the receiver put in evidence the papers upon which the order of October 9th was made (p. 79), Murphy's Ex. 7. The Hofman Co. moved in the Federal Court in November, 1903, to vacate the order of October 9th, *but not to vacate or modify the order of August 18th*, 1903.

The trial court refused to receive in evidence the papers used in the Federal Court on that application (pp. 43-45.) Murphy's Exhibits Nos. 11, 12, 13, 14, 17, 18, 19 and 20.

Of these, Ex. No. 19 was an order made in the Federal Court, *on the application of Hofman Company,* recognizing the Receiver's possession and then approving of it and directing the Receiver to do certain things in reference to this property; Ex. 20, showed compliance by receiver with that order. The trial court excluded these papers.

There was nothing further done by the Federal Court in reference to the injunction order of October 9, 1903, until October 11, 1904 (see p. 42 and p. 48).

In the meantime the following happened in the Federal Court, *all on due notice to Hofman Company:*

(a) Dodge Co. was duly adjudged Bankrupt, October 14, 1903 (p. 80, Murphy's Ex. No. 8).

(b) Murphy was duly appointed Trustee of the Bankrupt, November 28, 1903 (p. 88, Murphy's Ex. 21, 22).

(c) Murphy, as Receiver, was duly ordered to turn over the property to Murphy, as Trustee (Murphy's Exs. Nos. 24 and 25, pp. 88, 89).

This order was excluded by the trial court. It shows directions by the Federal Court as to this property.

(d) The accounts of Murphy, as Receiver, were *rendered to* and *approved by the Federal Court,* March 1, 1904 (Ex. 27, p. 89, showing disposition of this property). *Excluded by trial court.*

(e) Inventory of Trustee, showing these show cases (Murphy's Ex. 29, pp. 43, 44 and 164), as a part of the bankrupt's estate. *Excluded by trial court.*

(f) Order of Federal Court directing sale of this property (Murphy's Ex. 30, p. 90), giving persons interested opportunity to object to sale; and notice of the court thereof, *with proof of its service on Hofman Co.* (Plff. Ex. 31, p. 91.) Excluded by trial court.

(g) Order of Federal Court, directing sale of this property after notice to Hofman Co. and without objection on its part. (Murphy's Ex. 32, pp. 91 and 45). Excluded by trial court.

(h) Terms of sale prescribed by the Federal Court, signed by its Referee. Trustee's Report of Sale. Confirmation of the sale by Federal Court, and conveyance by the Trustee, pursuant thereto, of this property—All October 10, 1904; and application of proceeds to bankrupt estate. (Murphy's Ex. 32, 33, 34, 35, 36, 37, pp. 91 and 92.) Excluded by trial court.

These various papers, had they been admitted, would have shown the disposition of this very property in the Federal Court, by its express orders, on notice to Hofman Co., without objection by it. And would have shown that every act of Murphy as Receiver, and as Trustee, in the Federal Court, was in obedience to the orders of that Court without the exercise of any discretion or volition on his part.

It is our contention that those orders should have been received in evidence, and that they afforded Murphy, the individual, immunity from personal prosecution in the State Court as for a tort, a prosecution which has entailed upon him great loss, liability and expense.

After the Federal Court has thus disposed of all this property, and received for the bankrupt estate the proceeds, and on October 11, 1904, that Court modifies the injunction order of October 9, 1903 (Hofman Co.'s Ex. 23, p. 42), which order is expressly admitted to have been made October 11, 1904, and entered October 18, 1904 (p. 48).

After that, Hofman Co. goes on with this action, makes and verifies its complaint (pp. 5 and 6), charging Murphy, the individual, with a wrongful taking and detention, and claiming $1,000, damages from him, as an individual.

In his answer Murphy sets up the bankruptcy proceedings in the Federal Court, the order of August 18, 1903, appointing the receiver, and enjoining interference with the property; the possession in the Dodge Co., bankrupt, and the peaceable delivery to the receiver; and claims that by reason of the facts set up the State Court was without jurisdiction.

Thus, at the very outset, the plaintiff in error claimed im-

munity from personal prosecution because of the order of the Federal Court, and asserted the exclusive jurisdiction of the Federal Court.

This case has passed through all the Courts of the State of New York, and our claim has been denied, but it elicited no citation of law or precedent therefor, no opinion, no expression of a reason.

This was one of that class of cases where the Receiver, the Federal officer, had no opportunity or power to exercise any discretion whatever, because:

(a) The property was found in the actual use and possession of the bankrupt, and was by it delivered to the Receiver, as a part of its property.

(b) This property was specifically mentioned in, and disposed of by, the several orders of the Federal Court, which were excluded from the evidence.

See record, Murphy's Ex. 24, Page 89.
" " 27, " 89.
" " 29, " 90.
" " 31, " 91.
" " 32, " 91.
" " 33, " 91.
" " 34, " 91, 45, 43.
" " 35, " 91, 45, 43.

POINTS.

I.

THE BANKRUPT'S ACTUAL POSSESSION OF THIS PROPERTY AT THE INCEPTION OF THE BANKRUPTCY PROCEEDINGS, AND ITS DELIVERY THEREOF TO THE RECEIVER, AS A PART OF ITS PROPERTY, RENDERED IT THE DUTY OF THE RECEIVER NOT ONLY TO TAKE BUT TO HOLD THE PROPERTY PENDING AN ORDER OF THE FEDERAL COURT AS TO ITS DISPOSITION.

In re Schermerhorn, 16 Am. Bk. R. 507.

(P. 509): "Upon the filing of a petition in bankruptcy, fol- "lowed by an adjudication, *all property in the possession of the* " *bankrupt of which he claims the ownership, passes at once into* " *the custody of the Court of bankruptcy,* and becomes subject " to its jurisdiction to determine, by plenary action or summary

"proceeding, as the nature of the case demands, all adverse or "conflicting claims thereto, whether of title or of lien; and that "court may, by the process of injunction, protect its jurisdiction "against interference. It may draw to itself the determination "of all controversies over the property in its possession, and "when it once lawfully attaches its jurisdiction cannot be de- "stroyed or impaired by the unauthorized surrender of possession "of the property by the officers of the Court, or through a seizure "thereof by an adverse claimant."

White v. Schloerb, 178 U. S. 542; 4 Am. Bk. R. 178.

(182) "At the date of this adjudication in bankruptcy by "the District Court of the United States, *the goods were in the "store of the bankrupts, and in their actual possession,* and *were "claimed by them as their property.* On the same date, that "Court referred the case to a referee in bankruptcy, and by his "direction the entrance to the store was locked. The goods were "then in the lawful possession and custody of the referee in "bankruptcy, and of the bankruptcy court, whose representative "and substitute he was. Being thus in the custody of a court of "the United States, they could not be taken out of that custody, "upon any process from a State court.

"So far as regards this point, the decision of this Court in "*Freeman v. Howe,* 24 How. 450, more than covers the case. "It was there adjudged that property taken and held by a marshal "on a writ of attachment from a court of the United States, "directing him to attach the property of one person, could not "be taken from his possession on a writ of replevin from a State "court in behalf of another person who claimed the attached "property as his own. See also, *Peck v. Jenness,* 7 How, 612, "625; *Buck v. Colbath,* 3 Wall. 334, 341; *Covell v. Heyman,* 111 "U. S. 176, 182."

"After an adjudication in bankruptcy, an action in replevin in "a State court cannot be commenced and maintained against the "bankrupt to recover property in the possession of and claimed "by the bankrupt at the time of that adjudication, and in the "possession of a referee in bankruptcy, at the time when the "action of replevin is begun."

In Sharpe v. Doyle, 102 U. S. 686, reversing *Doyle v. Sharpe,* 74 N. Y. 156.

It is said, speaking of the duties of Marshal or receiver:

"It was the purpose of the act of Congress to remedy this evil. "It therefore provides that, as soon as the petition in bankruptcy

"is filed, the court may issue to the marshal a provisional war-
"rant directing him to take possession of all the property and
"effects of the bankrupt and hold them subject to the further
"order of the court. To have limited this right or duty of seizure
"to such property as he might find in the actual possession of the
"bankrupt would have manifestly defeated in many instances the
"purpose of the writ. There is therefore no such limitation ex-
"pressed or implied. As in the writ of attachment or the ordi-
"nary execution on a judgment for the recovery of money, the
"officer is authorized to seize the property of the defendant,
"wherever found; so here it is made his duty to take into his
"possession the bankrupt's property wherever he may find it.
"It is made his duty to collect and hold possession until the as-
"signee is appointed or the property is released by some order
"of court, and he would ill perform that duty if he should ac-
"cept the statement of every man in whose custody he found
"property, which he believed would belong to the assignee, when
"appointed, as a sufficient reason for failing to take possession
"of it."

Would not the Receiver signally fail in the discharge of his duty; if he were not to retain, until otherwise ordered by his court, the property which is actually delivered to him by the bankrupt?

In re Rochford, 10 Am. B. R. 608.

Property claimed by another came into the lawful possession of the receiver of the bankrupt, was sold by the Trustee on notice to the claimant.

The Court says (p. 615): "The only question here presented
"is whether or not the referee and the court had jurisdiction to
"determine the validity of the claim of the mortgagee to the
"property or its proceeds. The sale was valid. *The court law-*
"fully acquired and rightfully held the custody of the property.
"The conversion of it into money by the sale was a rightful
"proceeding in bankruptcy. The issue of the notice to the mort-
"gagee to present his claim to the court and the adjudication of
"it were far within the jurisdiction of the referee, and of the
"court below, and the petition to review their actions cannot be
"sustained."

Whitney v. Wenman, 198 U. S. 539; 14 Am. B. R. 45.

This was a case where property in the actual possession of the bankrupt at the time of the filing of the petition, and coming from

the bankrupt into the hands of the receiver, was surrendered by receivers to other claimants without an order of the Federal Court.

It was held by this Court, that under the Bankruptcy Act, the Federal Court in Bankruptcy had actual jurisdiction to determine all questions as to the property; and that the receivers violated their duty in surrendering the property.

After quoting from prior decisions of this Court, the opinion of Mr. Justice Day says (p. 51):

"We think the result of these cases is, in view of the broad "powers conferred in Section 2 of the Bankrupt Act, authorizing "the bankruptcy court to cause the estate of the bankrupt to be "collected, reduced to money and distributed, and to determine "controversies in relation thereto, and bring in and substitute ad- "ditional parties when necessary for the complete determination "of a matter in controversy, that when the property has become "subject to the jurisdiction of the bankruptcy court as that of "the bankrupt, whether held by him or for him, jurisdiction "exists to determine controversies in relation to the disposition "of the same and the extent and character of liens thereon or "rights therein. This conclusion accords with a number of well- "considered cases in the Federal Courts." . . .

"It is insisted that in the present case the property was volun- "tarily turned over by the receiver, and thereby the jurisdiction "of the District Court, upon the ground herein stated, is defeated, "as the property is no longer in the possession or subject to the "control of the court. But the receiver had no power or authority "under the allegations of this bill to turn over the property. He "was appointed a temporary custodian, and it was his duty to "hold possession of the property until the termination of the "proceedings or the appointment of a trustee for the bank- "rupt." . . .

"The court had possession of the property and jurisdiction to "hear and determine the interests of those claiming a lien therein "or ownership thereof. We do not think this jurisdiction can "be ousted by a surrender of the property by the receiver, with- "out authority of the court."

"In re Leeds, 12 Am. B. R. 136.

(137): "The referee, as custodian or receiver, or a receiver "*ad interim*, has no title to the goods, and no right or authority, "to *determine any question of title or ownership and no right* "*to make any surrender of the goods to any claimant.*"

(145): "I think it may be affirmed upon all the cases that "the question of the jurisdiction of the bankruptcy court depends "upon the possession of the bankrupt at the time of the filing "of the petition. Whether he was the real or qualified owner, "or held it in some other capacity, the bare possession by him "gives the bankruptcy court jurisdiction, particularly if that "possession passes into the hands of the official administrators "of the bankruptcy court, such as receivers, either temporary, or "*ad interim.*"

"*Gluck & Becker, on Receivers:*

(389) "Where the receiver takes possession of property in "obedience to the order of the court appointing him, he acts inno- "cently under the positive orders of that tribunal, and ought "not to be held responsible for any trespass which he may have "committed while so acting. . . ."

(390) "Where the question relates to property, the possession "of which by the corporation was not wrongful, but under color "of title, . . . the possession of such property by the re- "ceiver is not wrongful; he succeeds to the rights of the cor- "poration, and since the latter was not a trespasser the receiver is "not, *and it is his duty to retain possession until otherwise ordered "by the court which appointed him.*"

"*Alderson on Receivers:*

(329): "When a receiver is lawfully in possession of prop- "erty he is not liable personally to the claimant thereof. There "is lawful possession when the property is voluntarily delivered "to the receiver."

We think it clear from the foregoing that the delivery by the *Bankrupt* of the property, to the Receiver of the Federal Court, imposed upon that Receiver, as an officer of that Court, the active duty of retaining the property pending an order of the Federal Court.

This proposition we sought to accentuate by showing that thereafter the Federal Court did by its several orders, absolutely and effectively dispose of the property, but the trial court excluded this evidence, erroneously, we claim.

This action sounds in tort. The allegation that charges Murphy with liability is that he "wrongfully took" and "wrongfully detains" the property. (P. 6.)

If the receiver was properly discharging his duty as an officer of the Federal Court, he could not thereby commit, as an in-

dividual a wrong, for which he could be punishable in the Courts of the State of New York.

Stanley v. Schwalby, 147 U. S. 508.

This was an action of ejectment, brought against Stanley and others, as individuals. They had occupied the land as officers of the United States Army under U. S. authority.

"Among these cases are those where an individual is sued in "tort for some act injurious to another, in regard to person or "property, in which his defense is that he has acted under the "orders of the government. In these cases he is not sued as an "officer of the government, but as an individual, and the court "is not ousted of jurisdiction because he asserts the authority of "such officer. To make out that defense he must show that his "authority was sufficient in law to protect him. . . . *In "such a case the validity of an authority exercised under the "United States is drawn in question, and where the final judg-"ment or decree in the highest court of a state in which a decision "could be had, is against its validity, jurisdiction exists in this "court to review that decision on writ of error.*"

Supreme Court of Texas reversed.

U. S. v. Lee, 106 U. S. 196.

From dissenting opinion of Mr. Justice Gray concurred in by the Chief Justice, Mr. Justice Bradley and Mr. Justice Woods:

"As to Kaufman and Strong, the court erred in compelling "them to proceed to trial after the interposition of the United "States; and in declining to instruct the jury, as they requested, "that if the United States, through their officers and agents, "charged with the control of the same, were in the possession of "the property in controversy, using it as a national cemetery for "the burial of deceased soldiers, and as a fort and military reser-"vation, claiming title under the certificate of sale proved in the "case, and the defendants occupied the same only as such officers "and agents, in obedience to the orders of the War Department of "the United States, and making no claim of right to the title "or possession except as such officers, the verdict must be for the "defendants. Judgment of reversal should therefore also be en-"tered upon the writ of error sued out by them."

The questions discussed under this point are raised in the record in the exceptions to exclusion of evidence.

In the answer, pages 7, 8.

Motion for non-suit, 5, 6, 7, 8, 9, pages 61, 62.

Motion for non-suit, 3, 5, 6, 7, 8, 9, 12, 13, 18, 19, 21, 22, 24, pages 95, 96, 97.

Requests to charge and exceptions, pages 102, 106.

And in the assignment of errors, pages 119, 124.

II.

THE FEDERAL COURT HAVING FOUND THE PROPERTY IN THE POSSESSION OF THE BANKRUPT, WHO CLAIMED IT, HAD EXCLUSIVE JURISDICTION, AND HAVING BY ITS ORDERS DISPOSED SPECIFICALLY OF THE PROPERTY PRIOR TO OCTOBER 11, 1904, ON NOTICE TO THE HOFMAN CO., ITS DISPOSITION WAS EFFECTUAL AND CONCLUSIVE. THE STATE COURT WAS WITHOUT JURISDICTION TO REVIEW, MODIFY OR DISTURB THE DISPOSITION MADE BY THE FEDERAL COURT.

Bankruptcy Act, Sec. 2, (3), (5), (6), (7), (15).
Bankruptcy Act, Sec. 1, (7), (8), (9).
Federal Constitution, Art. 1, Sec. 8.
Federal Constitution, Art. 3, Sec. 2.
White v. Schloerb, 178 U. S. 542 (above).
Whitney v. Wenman, 198 U. S. 539 (above).
Central Nat. Bank of Boston, v. Stevens, 169 U. S. 452:

(Syl.): "A State court has no power to impeach and nullify "a decree of the Circuit Court of the United States, rendered in "a case in which it had jurisdiction. by enjoining its enforce- "ment, though the injunction is directed in personam against the "parties entitled to the benefit of such decree, over whom it has "jurisdiction."

The Court says, quoting from *Peck v. Jenness*, 7 How. 612:

"It is a doctrine of law too long established to require a cita- "tion of authorities, that, where a court has jurisdiction, it has "a right to decide every question which occurs in the cause, *and* "*whether its decision be correct or otherwise, its judgment, till* "*reversed, is regarded as binding in every other court.*"

And quoting, also, from *Riggs v. Johnson*, 6 Wall. 166:

"State courts are exempt from all interference by the federal "tribunals, but they are destitute of all power to restrain either "the process or proceedings in the national courts. . . . Ap-

" pellate relations exist in a class of cases, between the State courts " and this court, . . . Viewed in any light, therefore, it " is obvious that the injunction of a State court is inoperative to " control, or in any manner to affect, the process or proceedings " of the Circuit Court; not on account of any paramount jurisdic- " tion in the latter courts, but because in their sphere of action, " Circuits Courts are wholly independent of the State tribunals."

And the Court further says, in the opinion: " *Whether due " effect has been given by a State court to a judgment or decree " of a court of the United States, is a federal question within the " jurisdiction of this court, on a writ of error to the Supreme " Court of the State.*" Citing

Crescent State Live Stock Co. v. Butchers' Union, 120 U. S. 141.

" The exemption of the authority of the courts of the United " States from interference by legislative or judicial action of the " states is essential to their independence and efficiency.

Freeman v. Howe, 24 How. 450.
Buck v. Colbath, 3 Wall. 334.
Railroad Co. v. Gomila, 132 U. S. 478."

And the Court further says: " But it has been frequently de- " termined by this court, that the jurisdiction of a court is not " exhausted by the rendition of the judgment, but continues until " the judgment shall be satisfied. Thus it was said in *Riggs v. " Johnson Co.,* 6 Wall. 166, that process subsequent to judgment " is as essential to jurisdiction as process antecedent, else the " judicial power would be incomplete and entirely inadequate to " the purposes for which it was conferred by the constitution."

Dowell v. Appleby, 152 U. S. 327:

(Syl.): " The fact that the record in a Federal Court fails " to affirmatively show federal jurisdiction, does not make its " judgment a nullity or render it subject to collateral attack, and " this is true when the court assumes jurisdiction because it holds " that the suit involves the construction of an act of Congress, " even if it is mistaken in so holding."

Covell v. Heyman, 111 U. S. 76.

(Syl.): " A person holding himself aggrieved through a wrong- " ful attachment in execution by United States marshal *acting " under authority of a United States Court, must seek redress in*

" *that court.* He has not recourse for that purpose to the courts " of the several states."

Quoting from the opinion: " The defendant in error was the " plaintiff in the State court, and brought her action of replevin " for the recovery of specific personal property to which she " claimed title, and which she alleges was wrongfully detained " from her by the plaintiff in error.

" The defendant below was deputy marshal of the United States " and as such, had possession of the property replevied by virtue " of an execution issued upon a judgment of the Circuit Court " of the United States, for the western district of Michigan, " against Adolph Heyman, having taken the same by virtue of " a levy under said execution, as the property of the judgment " debtor. Judgment was rendered in the Supreme Court of the " State, for the plaintiff below, upon a finding in favor of her " title to the property. . . . *The sole question presented for* " *our decision, is whether it was error in the State court to permit* " *a recovery of the possession of property thus held against a* " *marshal of the United States, or his deputy, for the rightful* " *owner, and whether, on the other hand, it should not have ad-* " *judged in favor of the defendant below that his possession of* " *the property by virtue of the levy under the writ, was in itself* " *a complete defense to the action of replevin, without regard to* " *the rightful ownership.*"

The opinion cites *Freeman v. Howe,* 24 How. 450; *Taylor v. Carryl,* 20 How. 583:

" The point of the decision in *Freeman v. Howe,* is, that when " property is taken and held under process *mesne* or final, of a " court of the United States, it is in the custody of the law and " within the exclusive jurisdiction of the court from which the " process has isued for the purposes of the writ; that the possession " of the officer cannot be disturbed by process from any State " court, because to disturb that possession, would be to invade the " jurisdiction of the court, by whose command it is held, and to " violate the law which that jurisdiction is appointed to administer; " that any person, not a party to the suit or judgment, whose prop- " erty has been wrongfully, but under color of process, taken and " withheld, may prosecute by ancillary proceedings *in the court* " *whence the process issued,* his remedy for restitution of the prop- " erty or its proceeds, while remaining in the control of that " court, . . . The case goes on to say that, in cases where " the property in question is specifically pointed out by the order

" of the court, speaking of the officer, as he has no discretion, " *it is the court itself which acts 'and the officer is protected in* " *his obedience to its command.'* "

" In *Lammon v. Teusier,* 111 U. S. 17, it was said by Mr. " Justice Gray, in reference to the case of a common-law attachment " that 'the taking of the attachable property of the person named " in the writ is rightful, the taking of the property of another " person is wrongful, but each being done by the marshal in exe- " cuting the writ in his hands, is an attempt to perform his offi- " cial duty and is an official act.' The same is true of a similar " levy under an execution, as we have shown that there is no " difference, relevant to the point, between the two writs. Prop- " erty thus levied on by attachment or taken in execution is " brought by the writ, within the scope of the jurisdiction of the " court whose process it is, and as long as it remains in the pos- " session of the officer, it is in the custody of the law. *It is the* " *bare fact of that possession under claim and color of that* " *authority, without respect to the ultimate right to be asserted* " *otherwise and elsewhere, as already sufficiently explained, that* " *furnishes to the officer complete immunity from the process of* " *every other jurisdiction that attempts to dispossess him.* That " was the defense made and relied on by the plaintiff in error in " the present case, and to which the Supreme Court of Michigan " refused to give its due and conclusive effect. For that error, " its judgment is reversed."

In re Watts, 190 U. S. 1.

In the opinion of the court there is mentioned, " voluntary de- " livery of property by the officer of a court, without the court's " consent, and, therefore, unlawful."

Showing a recognized principle that there is no power in the officer of the court to make delivery without the court's order. And in the same opinion, it is further stated:

"The difficulty is that the receiver had no power to make the " surrender when it was made. It was the representative of the " State court. The property in its hands was property *in custodia* " *legis,* and it had only such authority as was given to it by the " court and could not exceed the limits prescribed by the court." This case holds that the bankruptcy Act of 1898, Sec. 2, gives to the courts in bankruptcy, jurisdiction in the administration of the affairs of insolvent persons and corporations, that is essentially exclusive.

Wiswall v. Sampson, 14 How. 52:

(Syl.) "Where real estate is in the custody of a receiver, "appointed by a court of chancery, a sale of the property under "an execution, issued by virtue of a judgment at law, is illegal "and void."

It is said in the opinion, "When a receiver has been appointed "his possession is that of the court, and any attempt to disturb "it, without the leave of the court first obtained, will be a con- "tempt on the part of the person making it." Citing *Angel v. Smith,* 9 Ves. 335.

It seems to be held in this case, in effect, that no valid rights can be acquired under or by means of a proceeding which is one in contempt of court.

Feibelman v. Packard, 109 U. S. 421, holds that "under the "Bankrupt Act of 1867, the District Court of the United States, "sitting in bankruptcy, has jurisdiction to order the seizure and "detention of goods, the property of the bankrupt."

Sharp v. Doyle, 102 U. S. 686:

This is a case where in a bankruptcy proceeding warrant was issued to the United States Marshal, to take possession of the bankrupt's estate, and in discharge thereof he seized property that was not in possession of the bankrupt, but in possession of other persons claiming to have title thereto. Suit was brought against him, and the court below held that the marshal could not be permitted to show that the property was in fact the property of the bankrupt.

This court says in the opinion, of the court below: "But the "court said, 'you shall not be permitted to prove that. If plain- "tiffs show that they were in possession, asserting ownership, "you will not be allowed to contradict that assertion.' Such a "proposition is opposed to all the analogies of the law." . . .

City Bank of New Orleans, In re Christy, 3 How. 292, holds that under the Bankruptcy Act of 1841 (Syl.), "The District "Court, when sitting in bankruptcy, has jurisdiction over liens "and mortgages existing upon the property of a bankrupt." . . . That the phrase "any creditor or bankrupt who 'shall "claim any debt or demand under the bankruptcy,' does not "mean only such creditors who come in and prove their debts, "but all creditors who have a present subsisting claim upon the "bankrupt's estate, whether they have a security or mortgage "therefor, or not." In the case of a contested claim the Dis- trict Court has jurisdiction to proceed summarily.

The cases cited above illustrate the soundness of Murphy's defense. He was not, on the trial, seeking an award of the property itself, as against the Hofman Company.

The sheriff's return that he took the property from Murphy on October 6th, 1903 (see page 5, Hofman's Ex. No. 21), in view of the injunction order of August 18, 1903 (p. 48), and the evidence above cited of the delivery of the property to the receiver, shows an act in contempt of the Federal Court, an act without the jurisdiction of the State court and therefore void.

And in view of the evidence of the deputy-sheriff (p. 35), "I "did not take away any show cases. I did not lock any of them "up. I did not take any key of the store . . . I did not "place any keeper in charge. It is a fact that I went away and "left those show cases all there in use by the receiver, in exactly "the same physical situation that they were before I came into "the store," had Mr. Murphy been allowed to place in evidence, the order and papers of the Federal Court, the falsity of the sheriff's return would have been conclusively established.

Murphy's exhibits:

No. 19. Order of November 10, 1903, page 45.
No. 24. Order to deliver to Trustee, page 89.
No. 27. Order approving account of Receiver, page 89.
No. 29. Inventory of Trustee, page 90.
No. 31. Notice of sale, page 90.
No. 32. Terms of sale, page 90.
No. 34. Report of sale, page 91.
No. 35. Order confirming sale, page 91.

Murphy was entitled to immunity from prosecution because in all that he did he had simply obeyed the orders of the Federal Court, and because the State Court was without jurisdiction.

Resting upon that position, he was entitled to a dismissal of the complaint, and the State Court was in error in its determination to award the property to some one in this action (pp. 102-106).

Nor is Murphy in any manner concluded from obtaining that which is his right, because in the prayer of his answer he may have asked too much.

Any claim, in him, for the property was effectually withdrawn on the trial.

Colby v. Reed, 99 U. S. 560.

III.

THIS COURT HAS JURISDICTION TO REVIEW IN THIS CASE THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

This case presents a situation where an officer of the Federal Court, acting under its orders, in absolute good faith (and as against him the complaint does *not even suggest* any fraudulent act) has received property from the possession of the bankrupt, has regularly administered upon that property, through all the steps of the bankruptcy court; has sold the property under such orders, *which were made on notice to the Hofman Co., and were not objected to by it,* where the Federal Court has approved every step as to this property, and has appropriated to the bankrupt estate the proceeds of such sale; and where, now, despite the Federal orders, this plaintiff in error is, through the medium of this suit in a State Court, deprived of all protection and punished —in costs and expenses in a large sum—for his obedience to the orders of the Federal Court; orders that should have been received in evidence; orders that he was absolutely bound to obey, and orders that should be held to afford him complete protection.

Nutt v. Knut, 200 U. S. 13, it is held that:

"A party who insists that a judgment cannot be rendered "against him consistently with the statutes of the United States, "may be fairly held within the meaning of U. S. Rev. Stat. Sec. "709 (providing for writs of error from the Supreme Court of "the United States to the State courts to assert a right and im- "munity under such statutes."

Pittsburg, C. C. & St. L. Ry. Co. v. Long Island Loan and Trust Co., 172 U. S. 493:

(Syl.): "A claim pleaded and relied on as a defense to a "suit in a State Court to enforce a lien on property, that such "lien was wholly devested and discharged by foreclosure pro- "ceedings against the property in a Federal Court, through "which proceedings the defendant claims title is such an asser- "tion of a right or title under an authority exercised under the "United States, as gives the Supreme Court jurisdiction to re- "examine a final judgment of the highest court of the State, "denying such right or title on a writ of error. It is incumbent

"on a State court to give a judgment of a Federal Court such "effect, and only such, as it would be entitled to, if a judgment "of a court of the state rendered in a like case and under similar "circumstances."

Belden v. Chase, 150 U. S. 674.

This court held that the failure of the State Court to give proper instructions recognizing the obligatory force of the rules of navigation, presented grounds for federal relief, and gave right to review in this court.

Giles v. Little, 134 U. S. 645:

"It is well settled, that in order to give this court jurisdiction "to review a judgment of a State Court against a title or right "set up or claimed under a statute of, or an authority exercised "under, the United States, that title or right must be one of "the plaintiff in error and not of a third person only."

Ludeling v. Chaffee, 143 U. S. 301:

"In order to give this court jurisdiction of a writ of error to "review a judgment of a State Court against a right claimed under "a statute of the United States, that right must be one of the "plaintiff in error, and not of a third person only."

Houston & Texas C. R. Co. v. Texas, 177 U. S. 66:

It says of a federal question, "It having been properly raised in "the State Court and decided against the contention of the party "setting it up, this court may review it on error to the highest "court of the State."

This case presents not only an instance of a great injustice done to this plaintiff in error; not only the great hardship of having, at his peril, in a State Court, to uphold, as on review, the adjudications of the Federal Court, but it presents questions of great importance to the entire country.

Have the Federal bankruptcy courts the power to exercise the jurisdiction Congress has given them over the property of bankrupts?

Must that jurisdiction be respected in the State Courts?

Must the determination of the Federal Court in bankruptcy be recognized and given effect in the State Court?

Shall the officer of the Federal Court be protected from personal suit and punishment in the State Court, for obedience to the orders of the Federal Courts of bankruptcy?

These are some of the questions presented by this record.

We respectfully submit that they should be, and that until this time, they have been each answered in the affirmative. Yet in this case, by the courts of the State of New York, they have each been answered in the negative.

The provisions of the Federal Constitution, Art. 1, Sec. 8, as to bankruptcy, have been ignored.

The Federal Bankruptcy Act of July 1, 1898, as amended February 5, 1903, has been disregarded.

The jurisdiction of the Federal judiciary, as defined by the Constitution, Art. 3, Sec. 2, and as construed by this Court, has, in effect, been denied.

This plaintiff in error has been deprived of his property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution, in that he has been wrongfully subjected to this suit and to the great costs that it has entailed.

If a receiver or trustee, after receiving from the bankrupt property, and after selling it pursuant to the orders of the Federal Court, can be subjected, in a State Court, to a personal suit in reference to such property, then every Federal official in bankruptcy will act at all times at his own peril.

We do not understand that such has ever been the law. No opinion has been written, as yet, by any Court that has considered this action.

No reason or precedent, whatever, given, in support of the decision rendered. We have been unable to find any precedent in the records of this Court.

We respectfully submit that the decision and judgment of the Court of Appeals of the State of New York in this action should be reversed.

HERBERT D. BAILEY,
Attorney for Plff. in error,
Edward Murphy, 2d,
Troy, N. Y.

Supreme Court of the United States.

OCTOBER TERM 1907.

NUMBER 248.

EDWARD MURPHY, 2ND,
Plaintiff in Error,

against

JOHN HOFMAN COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This action comes to this Court by writ of error to the Court of Appeals of the State of New York.

The questions presented to this Court for decision relate to the right to maintain an action in the state courts against an individual to recover personal property, which property, it is claimed by the plaintiff in error, was in the possession of a Receiver in Bankruptcy. That the title or right to possession or possession of the property in question was in the bankrupt and in the receiver, *is not admitted* by the defendant in error, that being the question litigated upon the trial and decided adversely to the plaintiff in error.

The question is also raised by the record as to whether the plaintiff in error did not upon the trial stipulate away and surrender any rights guaranteed to him by the Federal Statute.

FACTS FROM THE RECORD.

Counsel for the plaintiff in error takes exception (page 4 of his brief) to the fact that so much of the record is printed. The amount of printing was caused by the fact that the appellant in his statement of the parts of the record which he desired printed so unfairly presented the case that the respondent necessarily was compelled to propose many amendments and at the suggestion of the Clerk that it would not be more burdensome to print the whole record, that plan was adopted.

The following are the important facts contained in the record:

On the 4th day of September, 1902, James Dodge leased to the Church-Dodge Company certain premises situated in the City of Troy for a period of practically ten years (Page 11, et seq.). By the lease the tenant agreed not to take down any fixtures, shelving, etc., without permission of the landlord (Page 12). A few days later the tenant and the landlord made another agreement as a part of the lease (Page 12, et seq.). This agreement contains peculiar provisions, viz.: That in case the tenant should become insolvent or be adjudged a bankrupt, or pass into the hands of a receiver, *all show cases* and other appliances should immediately revert to and become the property of the landlord (Page 13). Soon after the lease was made Dodge, the landlord, conveyed the property to the Century Mercantile Company, one of the defendants in this action (Page 13). The name of the tenant, the Church-Dodge Company, was changed to the Dodge Dry Goods Company (Pages 13 and 14).

In February, 1903, the defendant in error made a contract with Schwarzwaelder & Company to furnish

certain show cases for $4,000.00, to be delivered at the store of the Church-Dodge Company in Troy (Page 14). In March, 1903, the Dodge Dry Goods Company, through its president, James E. Dodge, wrote the Hofman Company that they understood Schwarzwaelder & Company had given an order upon the Dodge Company to the Hofman Company for the price of the show cases. This letter contains the following sentence: *"Of course our acceptance of your show cases will depend upon their meeting with requirements of contract."* (Page 15). Another letter of the Dodge Dry Goods Company admits the receipt of the order (Pages 16 and 17). The order is at Pages 17 and 18. It will be noticed that this order is only good when the Hofman Company has delivered and set up complete to the satisfaction of the Dodge Dry Goods Company the show cases. Later the Dodge Dry Goods Company informs the Hofman Company that they will accept the order (Page 18). Later Schwarzwaelder & Company wrote to the John Hofman Company that they had assigned the contract made between Schwarzwaelder & Company and John Hofman Company to the Church-Dodge Company (Page 21). This letter contains the following:

"In order to avoid any complication or further dis-
"cussion, we wish to say that we have assigned our
"contract with you to the Church-Dodge Co. You
"having our order on them for the amount of the con-
"tract, covering show cases, *when the job is completed*
"to the entire satisfaction of the Church-Dodge Co.,
"and in accordance with our contract."

The cases were built by the Hofman Company and delivered at the store of the Dodge Dry Goods Company in Troy, and the bill was sent to that company. Under date of June 16, 1903, the President of the Dodge Dry Goods Company refused to accept the cases. After calling attention to the reason why the cases could not be accepted (Pages 23 and 24), the letter contains these sentences:

" We of course do not accept this case as meeting the " requirements of the specifications and contract and " hereby so notify you," and *"Again, one of the plate " glass ends in the case was cracked when placed. We " cannot allow such a defect and hereby so notify you."* (Page 24).

After saying that he was willing to take up the matter for adjustment (Page 24), Mr. Dodge says: *"How- " ever pending such a result, we refuse to accept your " case and work."* Again, under date of June 20th, Mr. Dodge writes the Hofman Company (Pages 24 and 25), and makes a claim of $2,222.00 damages, more than half the amount due. In this letter he says: *" While " not in any way receding from the position taken in " our last letter."* Again Mr. Dodge says (Page 25): " Now if you will meet the proposition here made for " the purpose and for the sole purpose of avoiding any " controversy or litigation about the matter, *then we " will accept your cases."*

On August 18, 1903, the defendant Edward Murphy, 2nd, was appointed temporary receiver of the Dodge Dry Goods Company in bankruptcy proceedings (Page 48). A few days after, on August 21, 1903, a demand for the return of these show cases was made upon the defendant, Edward Murphy, 2nd (Page 27). At the time of the demand Mr. Murphy did not say anything about being receiver. He simply objected to delivering the cases (Page 27). He said " He read the paper " and told me that he must object to delivering the " goods to us, he said nothing more. He did not say " anything about his being receiver. He simply said " he must object to delivering the cases."

This action was begun by the service of a summons and the usual affidavit and requisition in replevin on the 6th day of October, 1903 (Page 1).

On the 9th day of October, 1903, the defendant Murphy obtained an injunction *ex parte* from the

United States District Court staying all proceedings in this action (Page 41). A motion was made immediately thereafter and at the next term of court and on the 10th day of November, 1903, to vacate this injunction (Page 44), and the injunction was vacated by the District Court (Pages 42 and 43). The deputy who executed the requisition describes how he replevied the goods (Page 34). He further says that he told Mr. Harper, an officer of the defendant The Century Mercantile Company, "I cannot take them out right "away. I have got to make preparations to find stor- "age and get people to take them down with teams and "the like of that."

Mr. Harper answered that they were all right and would be taken care of where they were (Page 46).

When Mr. Murphy was appointed receiver Mr. Dodge told the receiver that he claimed the show cases on behalf of the Century Mercantile Company (Page 75). Mr. Dodge was not only President of the Dodge Dry Goods Company, but he was an officer of The Century Mercantile Company (Page 74). When Mr. Murphy was appointed receiver he rented the store from The Century Mercantile Company from day to day (Page 72). The attorney for the Dodge Company was also the attorney for Century Mercantile Company (Page 78).

The receiver admits that The Century Mercantile Company claimed the show cases under the lease and supplemental agreement (Page 84). The receiver admits that a demand was made by the Hofman Company the day he qualified as receiver, viz., the 21st day of August (Page 84). The receiver admits that he did not include these show cases in his inventory as receiver. It was decided not to put them in on account of the claim made by The Century Mercantile Company (Page 85). The receiver admits that no notice for the application for an injunction was given to the Hofman Company, and that very soon after the injunction was served

the Hofman Company made an application to vacate it (Page 86). The receiver further says that the matter was not decided by the United States District Court until nearly a year after the application (Page 86). The receiver, after he became trustee, attempted to sell these show cases and they were sold to Mr. Byron and immediately turned over to the brother of the receiver according to a previous arrangement (Page 86). The receiver says that he left out everything in his inventory which came under the terms of the lease (Page 87). The show cases were never turned over by the trustee to anyone. After the injunction of the District Court was vacated they were taken on requisition in the state court and turned over to defendant in error.

POINTS.

ONE.

NO FEDERAL QUESTION IS INVOLVED IN THIS CASE AND NO OFFICER OF THE UNITED STATES COURT IS INTERESTED IN THE DECISION.

This action is not brought against Mr. Murphy as Receiver, but against him as an individual. His acts as Receiver are not brought into question. He did not take possession of the property as Receiver but as an individual. He was appointed Receiver of the property of the Dodge Dry Goods Company and not of the property of the John Hofman Company. Nowhere in the record is there any authorization to take charge of the goods in question. That the Dodge Dry Goods Company did not have the title to and did not have the possession or right of possession to the goods is shown by the record.

The Bankruptcy Court did not presume to take possession of these goods. That court recognized the situation when it made the order vacating the injunction which it had previously granted upon the *ex parte* statement of Mr. Murphy. This order provides (Page 43) "That the injunction order heretofore granted "in the above entitled matter by this court on "the 9th day of October, 1903, be and the "same is hereby vacated and annulled so far "as said order restrains or interferes with any "proceedings in an action in the Supreme "Court of the State of New York, in which "John Hofman Company is plaintiff, and "Edward Murphy, 2nd, and the Century Mer-"cantile Company are defendants, and so far "as said order in any manner interferes with "the prosecution of said action."

It was the duty of the Bankruptcy Court to protect its Receiver, and that court would protect its Receiver from any interference in the discharge of his duties, but it appeared to that court that the defendant in error was not attempting to interfere with the Receiver but was engaged in a controversy with an *individual* in whose welfare the Bankruptcy Court had no interest and over whose actions it had no control, and *the order vacating the injunction was a plain direction to the Receiver not to attempt to retain the showcases and that if he did attempt to retain them he did so at his own peril.*

Until this suit was brought it never occurred to the plaintiff in error to claim the showcases as Receiver. He assumed, and assumed rightfully, that the showcases did not belong to the bankrupt. The original agreement between the landlord and the tenant provides (Page

13) that " In case any time before the expira-
" tion of the term of said lease the said
" Church-Dodge Company shall be, or become
" insolvent, or shall make a general assign-
" ment or shall be adjudicated bankrupt under
" the bankruptcy act of the United States or
" shall pass into the hands of a receiver ap-
" pointed by any court of competent jurisdic-
" tion in any legal proceedings by or against
" said Church-Dodge Company, then and in
" such case, or in either such case, the term of
" said lease shall immediately expire and all
" improvements, fixtures, counters, shelving,
" *showcases,* etc., * * * shall immediately
" be surrendered with said demised premises
" and shall be and become the property of said
" James E. Dodge, his heirs, representatives,
" executors, administrators and assigns by
" virtue of said lease and this agreement, etc."

It will be remembered that the Church-Dodge Company mentioned in this agreement afterwards became the Dodge Dry Goods Company simply by a change of name and that James E. Dodge sold his interest in the premises to the Century Mercantile Company, one of the defendants in this suit.

This agreement was recognized by the Receiver because he did not include the showcases in the inventory. He says (Page 85):
" I determined what property should be in-
" cluded and I did not include those show-
" cases in my schedule as Receiver. That was
" done through some arrangement with Mr.
" Norton. It was finally decided not to put
" them in on account of the claim made by
" The Century Company to these fixtures."

Here was one claimant to the showcases whose claims were recognized by the Receiver and

in whose behalf, taking his own statement, he relinquished all claim to the showcases. Further than that, the Receiver rented the store with the fixtures in it by the day. He says (Page 84):

"I made an arrangement with Mr. Dodge at "that time to lease the store day by day."

If he took possession of the showcases he did so by virtue of the lease.

The record shows also that the bankrupt never claimed possession or the right of possession to the showcases.

The letter of the president of the bankrupt before the bankruptcy proceedings, after giving the reasons for his action, says (Page 24):
"We, of course, do not accept this case as "meeting the requirements of the specifica-"tions and contract, and hereby so notify "you."

And again, in the same letter, after offering to adjust matters, says:

"However, pending such a result, we refuse "to accept your case and work."

And later the president of the Dodge Dry Goods Company again writes the defendant in error (Page 24):

"While not in any way receding from the "position taken in our last letter."

And then proceeds to make an offer of settlement. He says:

"But for the purpose of putting the matter "in some kind of definite form, and *as a pro-"position of settlement without litigation, we "suggest that we retain the fixtures upon your*

"*making to us the following allowance,* as our "damages for delay and imperfect perform- "ance of the contract."

Why suggest avoidance of litigation and retention of the cases if the title had passed to the Dodge Company?

No claim was made for these goods upon Mr. Murphy as Receiver. The demand is addressed to "Edward Murphy, 2nd, Receiver, etc., "of Dodge Dry Goods Company" (Page 27). He is not addressed *as* Receiver, but the words "Receiver, etc.", are simply *descriptio personæ*. When this demand was served upon the receiver he did not refuse to deliver them on the ground that they were in the custody of the court. The witness who served the paper says (Page 27):

"He did not say anything about his being "Receiver. He simply said he must object "to delivering the cases."

In fact the determination to claim these goods as Receiver was an afterthought as a defense to this suit.

That Mr. Murphy did not make any claim to the goods as Receiver is shown by his action. The demand for the goods was made on Mr. Murphy on August 21, 1903. He says (Page 84):

"This demand is dated August 20th. The "next day it was served upon me."

This suit was not begun until October 6, 1903. (See Statement, Page 1).

During the six weeks, or thereabouts, which intervened between the demand when the Receiver was notified of the claim of the de-

fendant in error and the time when the suit was commenced, he made no application to the court which appointed him for instructions and in fact after that refused to include the goods in his inventory.

The claim of the Receiver that he was helpless and was the innocent victim of his office, is controverted by the principle laid down in *Dushane vs. Beall,* 161 U. S. 513. The opinion in this case says (Page 515):

"It is well settled that assignees in bankruptcy are not bound to accept property "which in their opinion or judgment is of "an onerous and unprofitable nature, and "would burden instead of benefiting the estate, and can elect whether they will accept "or not after due consideration and within "a reasonable time, etc. * * * The same "principle is applicable also to receivers and "official liquidators."

In re *George M. Hill Company,* 123 Federal Reporter 866 the Court says:

"The question is not whether the vendee was "justified in its refusal to accept, but whether "it did in fact refuse. Rightfully or wrongfully, the bankrupt did insist that the Dexter Folder Company should furnish another "suited to the enlarged folder. The bankrupt, now that the vendor seeks to take back "the machine, may not be heard to say that "it accepted what it constantly declared it "would not accept. It may not be permitted "now to take advantage of its own bad faith "as found. *Nor can the Receiver of the bankrupt be heard to say that the refusal to accept was arbitrary or capricious, fraudulent "and in bad faith,* for he stands in this respect

"in the shoes of the bankrupt, whatever may "be his right, with respect to an article de- "livered and accepted under a conditional "sale. The bankrupt having refused to ac- "cept, the Receiver has no higher right than "the bankrupt and cannot be allowed to assert "fraud and bad faith of the bankrupt to work "out an acceptance without which no title "passed to the bankrupt."

It hardly needs further argument to show that the title of this defendant does not rest upon any statute of the United States, but that as an individual he is attempting to use a shield not intended to protect him. The bankrupt disclaimed any title; the Receiver must be in the same position and cannot claim any title.

If he had no title he had no right to possession.

TWO.

THE STATE COURT HAD JURISDICTION OF THIS ACTION AND THE RECORD SHOWS NO QUESTION WHICH CAN BE DETERMINED BY THIS COURT.

The argument of counsel for the plaintiff in error continually begs the question at issue. He assumes, as one of the facts in the case, that the title to the property and the right to possession was in the bankrupt when the petition was filed, but those were the very questions litigated and were determined against the plaintiff in error by the state courts.

Under Point One we have called the attention of the court to the manner in which not only the bankrupt, but the Receiver himself, de-

clined to assert title to the property. The bankruptcy act nowhere gives exclusive jurisdiction to the United States courts to determine questions between receivers and trustees in bankruptcy and adverse claimants. The right of the United States Court to administer property which comes into its possession, must rest upon the principle where it applies that property once in the possession of a court will be administered by that court and not taken from its possession by some other court.

In *Cook vs. Whipple*, 55 N. Y. 150, the Court of Appeals of the State of New York lays down the principle that the jurisdiction of the state courts over the subject matter of an action where it is based upon a contract or is for the recovery of property, real or personal, does not depend upon the means by which plaintiff's title was acquired, and a right to property, given by act of congress, may be protected in a state court in the same way and to the same extent as though derived from any other source, and that the provisions of the bankrupt act, conferring jurisdiction in such cases upon the district and circuit courts of the United States, were not intended to interfere with and do not exclude the jurisdiction of the state courts.

In *Peck vs. Jenness*, 43 Am. Dec. 573, at page 581, the Supreme Court of New Hampshire says:

"The bankrupt act neither purports to inter-
"fere with the exercise of the jurisdiction con-
"ferred by the laws of the several states upon
"the state tribunals, nor to authorize the
"courts of the United States to interfere with
"it, except in such manner as is provided by
"the general laws in other cases."

In *State vs. Trustees*, 65 N. C. 714, at page 719, the court says, in speaking of the bankruptcy act:

"We agree that the only jurisdiction actually "conferred by that act is with these courts; "but it does not follow that an assignee may "not sue or be sued in the state courts, and "we think that an assignee may sue or be "sued in the state courts. If we entertained "the opinion that all controversies respecting "a bankrupt's estate could only be heard and "determined in the district or circuit courts of the United States."

The courts of the United States have passed upon the question.

In *Clafin vs. Houseman*, 93 U. S. 130, the Supreme Court of the United States (Page 134) says:

"The same conclusion has been reached in "other courts, both federal and state, which "hold that the state courts have concurrent "jurisdiction with the United States courts "of actions and suits in which a bankrupt or "his assignee is a party."

And again (page 135):

"The actions which lie in such cases are com- "mon law actions, ejectment, tresspass, trover, "assumpsit, debt, etc., or suits in equity. Of "these actions and suits the state courts have "cognizance. Why should not an assignee "have power to bring them in those courts, "as well as other persons."

And again (page 136):

"When we consider the structure and true "relations of the federal and state govern-

"ments, there is really no just foundation for "excluding the state courts from all such "jurisdiction."

In *Eyster vs. Gaff*, 91 U. S. 521, the Supreme Court of the United States (page 525) says: "The debtor of a bankrupt, or the man who "contests the right to real or personal prop- "erty, with him, loses none of those rights by "the bankruptcy of his adversary. The same "courts remain open to him in such contests, "and the statute has not divested those courts "of jurisdiction in such actions. If it has for "certain classes of actions conferred a juris- "diction for the benefit of the assignee in the "circuit and district courts of the United "States, it is concurrent with and does not "divest that of the state courts."

In *Bardes vs. Hawarden Bank*, 178 U. S. 524, the court cites with approval the decision in *Eyster vs. Gaff*, and holds that under the bankruptcy act of 1898 the state courts have jurisdiction of controversies between officials in bankruptcy and strangers, and says (page 537):

"On the contrary, congress, by the Second "Clause of Section 23 of the present bank- "ruptcy act, appears to this court to have "clearly manifested its intention that con- "troversies, not strictly or properly part of "the proceedings in bankruptcy, but inde- "pendent suits brought by the trustee in bank- "ruptcy to assert a title to money or property "as assets of the bankrupt against strangers "to those proceedings, should not come with- "in the jurisdiction of the district courts of "the United States, 'unless by consent of the "'proposed defendant' of which there is no "pretense in this case. One object in insert-

" ing this clause in the act may well have been
" to leave such controversies to be tried and
" determined, for the most part, in the local
" courts of the state to the greater economy
" and convenience of litigants and witnesses."

The cases cited by counsel for the plaintiff in error do not militate against the position taken by the defendant in error.

In *White vs. Schloerb*, 178 U. S. 542, certain questions were certified to the Supreme Court of the United States for its answer. In that case the goods in question had actually been locked up by direction of the referee in bankruptcy after an adjudication. An action of replevin was begun in the state courts, to which action the referee in bankruptcy was a party. A petition was presented to the District Court on behalf of the trustee asking for an order directing the sheriff who had taken the goods under the writ of replevin to return them to the bankruptcy court.

The Appellate Tribunal was asked whether the District Court had jurisdiction by summary proceedings to compel the return of the property and whether after an adjudication in bankruptcy an action in a State Court could be commenced and maintained to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.

The learned Justice who delivered the opinion of this Court says (Page 546):

" The questions certified concern, not the trial
" of the title to these goods but only the judic-
" ial custody and lawful possession of them."

In the case at bar the title to the showcases was the question tried.

The opinion further says with reference to the second question (page 547).

> "The second question certified relates to this "point although it is not so clearly expressed "as it might be and omits to mention in whose "possession the property was when the writ "of replevin was sued out. To that question, "*as explained and restricted by the facts set "forth in the statement which accompanies it,* "our answer is."

The Court further says (page 547):

> "*Not going beyond what the decision of the "case before us requires,* we are of the opin- "ion that the judge of the court of bankruptcy "was authorized to compel persons who had "forcibly and unlawfully seized and taken "out of the judicial custody of that court "property which had lawfully come into its "possession as part of the bankrupt's prop- "erty to restore that property to its custody."

In the case at bar the District Court refused to retain the possession of the property, but by its order vacating the injunction which it had expressly made, provided that the action in the state court should not be restrained.

The case of *Sharpe vs. Doyle,* 102 U. S. 686, referred to in the brief of the plaintiff in error, is an authority for our contention and not for that of the party who cites it. In that case two persons were adjudicated bankrupts and a warrant was issued under the seal of the Bankruptcy Court directed to the marshal of the district directing him to take possession, provisionally, of all the property of the bankrupts. Under this warrant the marshal seized eight packages of goods. He was sued in the State Court by the defendants in error who

recovered judgment against him which was affirmed by the Court of Appeals of the State of New York. The marshal, defendant in the case, made the plea that the goods were the property of the bankrupts and were lawfully seized under the warrant of provisional possession. The Supreme Court of the United States in the course of its opinion says (page 688):

"It is true that in a case of naked trespass, "without claim of right in the trespasser, the "possessor of the goods may recover, without "regard to the state of the title. But such "is not the case here. The defendant acted "under a lawful writ from a court which had "jurisdiction to issue it. *By his plea he took "upon himself the burden of proving that the "goods were subject to seizure under the writ;* "and in doing so he must of course prove that "the plaintiffs were not the lawful owners of "them. In other words that the right of the "assignee in bankruptcy, whose right he rep-"resented in that suit, was superior to that of "plaintiffs. But the Court said 'You shall "'not be permitted to prove that. If plaint-"'iffs show that they were in possession, as-"'serting ownership, you will not be allowed "'to contradict that assertion.' Such a pro-"position is opposed to all the analogies of "the law. If a writ be sued out of a court of "competent jurisdiction, directing an officer "to seize specifically described property, as "in admiralty, replevin or ejectment cases, it "is a protection to the officer when the officer "is sued in trespass for executing it. If, "however, it in general terms directs or au-"thorizes him to seize the property of an in-"dividual without a special description of it, "he exercises the authority conferred at his

"own risk as regards the ownership of the "property, and its liability to seizure under "that process. Such is the rule applicable to "an ordinary writ of attachment, and to a "*fieri facias* at common law. When, how- "ever, some one other than the defendant sues "the officer for a wrongful levy of the writ, "it has never been doubted that the title to the "property and the rightfulness of the seizure "under the writ were open to inquiry, and "that unless the plaintiff made out his case "before the jury, he must fail."

This Court further calls attention to the error made by the trial court in its charge to the jury, and says (page 690):

"As in the writ of attachment, or the ordi- "nary execution on a judgment for the re- "covery of money, the officer is authorized to "seize the property of the defendant wherever "found; so here it is made his duty to take "into his possession the bankrupt's property "wherever he may find it. It is made his duty "to collect and hold possession until the as- "signee is appointed or the property is re- "leased by some order of court, and he would "ill perform that duty if he should accept the "statement of every man in whose custody he "found property which he believed would be- "long to the assignee when appointed, as a "sufficient reason for failing to take posses- "sion of it. *But he does this on his own re- "sponsibility for not only a faithful but a "correct judgment in deciding what property "to seize. He is liable to suit if by mistake "he takes possession of property not liable to "seizure under his warrant.* Such a suit was "brought in this case; and we can see no "reason why the issue made by the pleadings,

"namely, the true ownership of the property, "should not have been fully submitted to the "jury. It was the shortest way to determine "the rights of the parties. It was the first "time the issue was presented. *It was before "a court of competent jurisdiction.*"

The above quotation shows clearly that there was a very broad distinction between the case cited and the one at bar. In the case cited the judgment of the State Court was reversed because the trial Judge had limited the defense of the defendant and had not permitted him to show ownership. In the case at bar the defendant was allowed to prove ownership so far as he could and after such proof the decision was against him.

In *Gluck & Becker on Receivers of Corporations,* the learned authors, at page 388, Section 92, in speaking of the rights and liabilities of receivers, say:

"The principle that when property has been "put by the decree of a Court of Chancery "into the hands of a receiver, his possession "is the possession of the Court which appoint-"ed him and any rights in the property can "only be determined by application to that "Court, will not protect a receiver for any "acts committed by him outside of the per-"formance of the proper and legitimate duties "of his receivership. The decree of a Court "of Chancery appointing a receiver entitles "him to its protection only in the possession "of property of which he is authorized or "directed by the decree to take possession. "When he assumes to take or hold possession "of property not embraced in the decree ap-"pointing him and to which the corporation "never had any title, he is not acting as the

"officer or representative of the Court of "Chancery, but is a mere trespasser, and the "rightful owner of the property may sue him "in any appropriate form of action for dam- "ages or to recover possession of the property "illegally taken or detained. A receiver may "frequently under color of office get possession "of property which does not belong to him, "and his official character ought not to be a "defense to his tortious action, or deprive "parties of their legal rights and remedies."

In the case, *In re Rochford,* 10 Am. B. R. 608, the only question decided was that the Bankruptcy Court has the right to determine a claim to property *lawfully acquired and held in the custody of the court.*

The question as to whether or not some other court might have jurisdiction was not considered.

The only point to the decision in *Whitney vs. Wenman,* 14 Am. B. R. 45, is that the Bankruptcy Court would have jurisdiction to determine the question as to the title of the property in dispute. This decision does not determine as to whether the State Court might or might not have jurisdiction.

In the case, *In re Leeds Woolen Mills,* 12 Am. B. R. 136, the only question decided was as to the jurisdiction of the Bankruptcy Court to decide whether the goods were held rightfully or wrongfully by the court. In deciding that it had such jurisdiction the court adds significantly (page 137):

"Whether it might also be rightfully decided "by any other jurisdiction it is not necessary "to determine."

In *Stanley vs. Schwalby,* 147 U. S. 508, the defendants were sued in trespass. The defense was that they held the land in question, which was the subject of the suit, as officers and by virtue of authority derived from the United States. The Court says at page 518:

"Among these cases are those where an in-
"dividual is sued in tort for some act injur-
"ious to another in regard to person or prop-
"erty, in which his defense is that he has
"acted under the orders of the government.
"In these cases he is not sued as an officer of
"the government, but as an individual, and
"the court is not ousted of jurisdiction because
"he asserts the authority of such officer. To
"make out that defense he must show that
"his authority was sufficient in law to protect
"him."

The Supreme Court in *Covell vs. Heyman,* 111 U. S. 176, cites with approval the principle laid down in *Buck vs. Colbath,* 3 Wall. 334. In that case the defendant in error sued the plaintiff in error in the State Court of Minnesota in an action of trespass for taking goods. The defendant in that suit offered as a defense that he was a marshal of the United States and having in his hands a writ of attachment against the property of certain persons he levied the same upon the goods described in plaintiff's petition but he did not aver that they were the goods of the defendant named in the writ of attachment.

On the trial plaintiff made proof of his ownership of the goods and defendant relied solely upon his office as marshal to hold the goods in the attachment suit.

The Court in its opinion in *Buck vs. Colbath,* says (page 342):

"How far the courts are bound to interfere "for the protection of their own officers is a "question not discussed in the case of *Free-* "*man vs. Howe,* but which demands a passing "notice here. In its consideration, however, "we are reminded at the outset, that prop- "erty may be seized by an officer of the court "under a variety of writs, orders or processes "of the court. For our present purpose, "these may be divided into two classes:

"1. Those in which the process or order "of the court describes the property to be "seized, and which contain a direct command "to the officer to take possession of that par- "ticular property. * * *

"2. Those in which the officer is directed "to levy the process upon property of one of "the parties to the litigation, sufficient to sat- "isfy the demand against him, without de- "scribing any specific property to be thus "taken. * * *

"It is obvious, on a moment's consideration, "that the claim of the officer executing these "writs, to the protection of the courts from "which they issue, stands upon very different "grounds in the two classes of process just "described. In the first class he has no dis- "cretion to use, no judgment to exercise, no "duty to perform but to seize the property "described. It follows from this, as a rule "of law of universal application, that if the "court issuing the process had jurisdiction in "the case before it to issue that process, and "it was a valid process when placed in the "officer's hands, and that, in the execution of "such process, he kept himself strictly within "the mandatory clause of the process, then "such writ or process is a complete protection

"to him, not only in the court which issued it, "but in all other courts. * * *

"In the other class of writs to which we "have referred, the officer has a very large "and important field for the exercise of "his judgment and discretion. First, in as- "certaining that the property on which he "proposes to levy, is the property of the per- "son against whom the writ is directed; sec- "ond, that it is property which, by law, is "subject to be taken under the writ; and, "thirdly, as to the quantity of such property "necessary to be seized in the case in hand. In "all these particulars he is bound to exercise "his own judgment, *and is legally responsible "to any person for the consequences of any "error or mistake in its exercise to his pre- "judice.* He is so liable to plaintiff, to de- "fendant, or to any third person whom his "erroneous action in the premises may injure. "And what is more important to our present "inquiry, the court can afford him no pro- "tection against the parties so injured; for "the court is in no wise responsible for the "manner in which he exercises that discretion "which the law reposes in him, and in no one "else."

The Court further says at the end of its opinion (page 347):

"We see nothing, therefore, in the mere fact "that the writ issued from the Federal Court, "to prevent the marshal from being sued in "the State Court, in trespass for his own tort, "in levying it upon the property of a man "against whom the writ did not run, and on "property which was not liable to it."

The case at bar is exactly within the principle laid down in *Buck vs. Colbath, supra.* The

receiver Murphy was not directed to take into possession any particular property of the Dodge Dry Gods Company, but simply to take the property of that Company. He exercised his own discretion and claims in this suit that he did take possession of the show cases and that consequently the State Court had no right to interfere with him.

It certainly would be an intolerable administration of justice if a receiver could safely follow in the footsteps of the receiver in this case and simply by claiming property when sued for its possession could prevent an innocent owner from bringing suit to recover property wrongfully seized except in that particular court which had appointed the receiver.

THREE.

THE TRIAL COURT MADE NO ERROR, EITHER IN THE RECEPTION OR REJECTION OF EVIDENCE, WHICH REQUIRES THE REVERSAL OF THE JUDGMENT.

Although fraud is not charged against the Receiver in the record it will be noticed that his relations with the Century Mercantile Company and with the other interested parties were very close, and it is very evident that he was doing all that he could to keep the showcases from the hands of the defendant in error and to favor the Century Mercantile Company and his own family as much as possible, and finally the Receiver, the plaintiff in error, attempted to sell these showcases and other fixtures and they were bought in for his brother. He says, page 86:

"This Mr. Byron that bought these fixtures "and show cases is an attorney in Troy. He "bought these showcases for my brother. "That was the understanding. And they "were immediately turned over to my brother "after the sale."

The demand was made upon the plaintiff in error by the defendant in error for the possession of these showcases on the 21st day of August, 1903, the day that plaintiff in error qualified as Receiver. (P. 84).

The rights of the parties were fixed by that demand and whatever may have occurred after that date could not interfere with the rights of the Hofman Company.

Plaintiff in error, upon the trial, attempted to introduce an enormous mass of testimony relating to the conduct of the proceedings in bankruptcy. Whether or not these proceedings were regular was immaterial and the defendant in error did not at anywhere dispute their regularity.

Nowhere in the record is there any evidence to show that the defendant in error was a party to these bankruptcy proceedings. It did not submit itself to the jurisdiction of the Bankruptcy Court. These various notices of sales and applications for orders, which plaintiff in error claims were served upon the defendant in error, were simply with relation to the property of the bankrupt, and *these showcases were not specifically named.* Why should the defendant in error, not admitting that these showcases were the property of the bankrupt, make itself a party or have anything to do with the proceedings in bankruptcy? It did not take part in these proceedings and what-

ever was done in the Bankruptcy Court was utterly immaterial.

The State Court obtained jurisdiction over these showcases on the 6th day of October, 1903, the day of the commencement of the suit.

Andrew Stone, the Deputy Sheriff, who executed the requisition in replevin, states that on the 6th day of October, 1903, he had a conversation with Mr. Murphy and told him that he had been over to the Dry Goods Store and replevied all the cases that were there (P. 31). His description of the manner in which the goods were replevied is found at pages 32 and 33. He could not actually take them away with him at that time as they were too long and heavy. He says: "I couldn't lift them. They were forty feet long and made of glass." (P. 34).

Murphy never took possession of these showcases as Receiver. He did not become trustee until December 1, 1903, nearly two months after the showcases had passed into the control of the State Court (P. 83). The only claim that he ever made to these cases as Receiver was simply for the purposes of this suit.

Upon the day that he was appointed Receiver he made an arrangement with Mr. Dodge to lease the store day by day (P. 84). These showcases were then claimed to be the property of the Century Mercantile Company, pursuant to the supplemental agreement of September 8, 1902, which provided that if the lessee passed into the hands of a Receiver, all the fixtures, including the showcases, should be immediately surrendered with the demised premises and become the property of the landlord (P. 13), and the Receiver says in speaking of his inventory:

"I determined what property should be in-
"cluded and I did not include those showcases
"in my schedule as Receiver. That was done
"through some arrangement with Mr. Nor-
"ton. It was finally decided not to put them
"in on account of the claim made by the Cen-
"tury Mercantile Company to these fixtures."
(Page 85).

It is plainly evident from this evidence that these showcases passed to the defendant in this suit, the Century Mercantile Company, as owner of the building, upon the appointment of a receiver of the Dodge Dry Goods Company; that the Receiver rented this property including the use of the showcases and that he recognized the claim of the Century Mercantile Company and did not make any claim to the showcases as Receiver. It was only when driven by the action of the Hofman Company to make a defense, and when he saw that the scheme in which he was engaged was liable to fall through that it occurred to him to claim that all the time he was holding these showcases as Receiver.

The Trial Court did not refuse to receive any evidence which was material to the issues before it.

FOUR.

UPON THE TRIAL THE PLAINTIFF IN ERROR WAIVED ANY CLAIM WHICH HE MIGHT HAVE TO THE PROPERTY IN DISPUTE AND THE TRIAL COURT HAD NO OTHER COURSE THAN TO DIRECT A VERDICT FOR THE PLAINTIFF, THE DEFENDANT IN ERROR.

After counsel on both sides had presented the case to the jury and the Court had delivered

its charge the following conversation took place (Page 102):

" Mr. Bailey: I except to the submission of " any question to the jury. I also except to " submitting to the jury the question as to " who this property is to be awarded. *The " defendant Murphy makes no claim to this " property in this action.*

" The Court: *Mr. Murphy does not wish the " property awarded to him?*

" The Court: *Does anybody that you repre- " sent?*

" Mr. Bailey: *No, we do not ask it.*

" Mr. Bailey: *No, sir.*

" The Court: *Does the Century Mercantile " Co.?*

" Mr. Bailey: *No, sir. The Century Mer- " cantile was cut out of it by the United States " Court.*

" The Court: This property ought not to " be sailing around without an owner. Why " should not the jury be directed, under those " circumstances, to award this property to the " plaintiff?

" Mr. Bailey: Because we have been put " to one thousand dollars damage and expense " in coming here to defend this action. Be- " cause this defendant was sued for one thou- " sand dollars and costs.

" Mr. Barhite: We have not made any claim " for damages.

" Mr. Bailey: We had to meet it. That is " what we were here for until to-day, when " counsel announced there was no claim for

" damages. Mr. Murphy has incurred ex-
" pense to the amount of one thousand dollars.

" The Court: Very well, I will change the
" direction with respect to that. I have not
" quite understood counsel about this matter.
" If counsel excepts to that and takes that posi-
" tion, I will direct that they find for the
" plaintiff.

" Mr. Bailey excepts.

" Mr. Bailey: I ask on behalf of the de-
" fendant Murphy a direction for the dis-
" missal of the complaint as to him, with costs.
" That would make some recompense for the
" expense we have been at. *We have nothing*
" *to do with the present possession of the*
" *property.*

" The Court: You relinquish all claims to
" the title and possession of the property?

" Mr. Bailey: Neither to title nor posses-
" sion. *We did not have possession and did*
" *not claim it, this individual did not at all.*
" Now, the judgment to be rendered, as far as
" the defendant Murphy is concerned, is one
" of dismissal against the plaintiff, with costs.
" That is what I have asked, and that is all
" I ask.

" The Court: *Do you claim it in his title*
" *of Receiver?*

" Mr. Bailey: *We are discharged as Re-*
" *ceiver and make no claim as such.*

" The Court: So you do not care to demand
" it in this action upon the ground of receiver-
" ship?

" Mr. Bailey: Oh, no. *We have nothing to*
" *demand as Receiver; upon the ground of*
" *receivership we do not claim the property*

" *at all.* I may say this to the court: Mr. " Murphy asked when this demand was served " upon him, for these people to apply to the " United States Court for protection with " reference to it, and they never done it. They " connot sue Mr. Murphy and get a judgment " in an action against him. He did not have " possession and never claimed possession. " *Mr. Murphy has not got the property and* " *has no interest in it. He is here because he* " *came here to defend himself against this* " *claim of one thousand dollars and costs. If* " *they had let up on that, he would never have* " *had a word to say in this action.*

" The Court: Did you put in your answer " any claim for the property.

" Mr. Bailey: Any claim to ownership?

" The Court: Yes, sir.

" Mr. Bailey: We did not. *I think in the de-* " *mand for judgment there is a claim for the* " *return of the property, but I submit we are* " *not entitled to it, and we do not ask it at all.*
" The Court: Then I shall certainly not " submit that question.

" Mr. Bailey: We do not ask for the prop- " erty, we ask for a judgment dismissing the " complaint with costs, so far as the defendant " Murphy is concerned.

" The Court: Can you also answer for the " Century Mercantile Co. in that respect?

" Mr. Bailey: I know that is Mr. Norton's " position.

" The Court: He has left you in charge of " the case?

" Mr. Bailey: All he said is that he wished " to have noted such objections and exceptions " as we took. I think that will cover it.

" The Court: Then I think it will be safe " to say to the jury that they award the prop- " erty to the plaintiff.

" Mr. Bailey excepted.

" Mr. Bailey: I do not see how you can de- " termine that question in this action, and I " cannot submit to any judgment with refer- " ence to that property here, *because we are* " *not in possession of it, and we do not claim* " *possession.* The judgment I ask and am en- " titled to is a dismissal of the complaint, as " against us. Now, that does not affect the " merits at all. We haven't any claim to it " nor possession."

Also at pages 105 and 106:

" The Court: I understand counsel for the " defense to take the position that they make " no claim to the property in question, and " disclaim any contention for it, in their own " behalf?

" Mr. Bailey: Yes, sir.

" The Court: Then, under those circum- " stances, I think the jury ought to be so in- " structed.

" Mr. Bailey: I think the court, taking into " consideration the treatment of this defend- " ant and the action brought against him, " should direct a judgment here of a dismissal " of the complaint as against this plaintiff, in " favor of this defendant, with costs. Can " we be put to all this expense and subject to " this pending liability all for nothing at all?

" The Court: The only way you can succeed " in the action is by contesting and having " your contention allowed.

" Mr. Bailey: *One of our contentions was, " that we were not in possession of the prop- " erty, did not claim it,* and were not proper " parties to this action.

" The Court: The only question before this " jury is whether this property shall be award- " ed to the plaintiff or to the defendant. The " other questions are subordinate questions " submitted to the jury, and the ultimate de- " cision of this jury means the awarding of " the property to either the plaintiff or to the " defendant. Now, if the defendant disclaims " any claim to this property, then I shall direct " a verdict that the jury award this property " to the plaintiff.

" Exception.

" Mr. Bailey: *We do disclaim any right to " the property. We do not claim that we have " any right to the possession of it.* We do not " ask it, but we do except to such a direction " and to such a verdict and to such a " judgment. I do not believe that the " plaintiff can make us parties defendant " with reference to property that we have " not possession of, had nothing to do with " and get a judgment for costs against us. I " do not think he has a right to make us a " party at all.

" The Court: The only way to prevent that " would be to insist that you have no claim " upon it.

" Mr. Bailey: We asserted it in our answer, " and set up there who did have the property, " and gave them notice of it.

" The Court: A motion is made on the part " of the defendant to dismiss the complaint " as to the defendants in this action, that mo- " tion I deny.

" Mr. Bailey excepted.

" The Court: *Assuming, upon the statement " of the defendant, that they claim no right to " a verdict for the possession of the property, " or that it shall be awarded to the defendant, " and there being no objection to the awarding " of the property to the plaintiff*——

" Mr. Bailey: I do except to the court mak- " ing any award of the property to the plaint- " iff in this action, as against the defendant " Murphy, wherein the defendant Murphy " was a party. *We do not claim for the de- " fendant any right or interest in any part of " this property.*

" The Court: You do not claim any award- " ing of the property to him by the jury?

" Mr. Bailey: *We do not.*"

This was an action brought to recover the possession of the chattels or their return. The plaintiff in error, in his answer, demanded the return of said chattels to him or their value (pages 8 and 9). By his statements to the Court the plaintiff in error waived all rights, which he might have under the pleadings or under the facts proven, and reiterated again and again that the plaintiff in error had no claim to the goods in question, either personally or as Receiver and that the only reason he was defending the action was that in the complaint the defendant in error had demanded $1,000 damages. Having made this waiver the Trial Court could do nothing except direct

a verdict in favor of the defendant in error. There was no question for the jury after the admissions made by the plaintiff in error and he had the perfect right to waive any rule of law or statute enacted for his protection.

In *Sentenis vs. Ladew,* 140 N. Y. 463, at page 466, the Court of Appeals of that State lays down this rule:

"But a party may waive a rule of law or a "statute or even a constitutional provision "enacted for his benefit or protection where "it is exclusively a matter of private right and "no considerations of public policy or morals "are involved and having once done so he "cannot subsequently invoke its protection."

The plaintiff in error simply stipulated himself out of court and he cannot now rely upon any rule of law which might have been used for his protection.

The plaintiff in error, in his answer, has demanded the return of the chattels or their value. He admits that as an individual he has no right and makes no claim to the chattels. As a Receiver he has been discharged and the estate in bankruptcy settled. A decision to the effect that he is entitled to these chattels or to their value would give to one not entitled thereto either the property or the value in money.

It is respectfully submitted that the judgment of the Court of Appeals of the State of New York should be affirmed with costs.

JOHN A. BARHITE,

Attorney for Defendant in Error,

Rochester, N. Y.

SUPPLEMENTAL POINT.

THE QUESTION LITIGATED IN THE STATE COURT WAS WHETHER THE BANKRUPT HAD TITLE TO THE PROPERTY IN QUESTION. THE DECISION DOES NOT PRESENT A QUESTION REVIEWABLE UPON A WRIT OF ERROR.

The issue presented to the State Court was whether the bankrupt had title to the property at the time the receiver was appointed. The Trial Court decided that it did not. This decision does not present a question of which this Court can take jurisdiction.

In *Scott vs. Kelly,* 22 Wall. 57, we find this language:

> "The question presented for the decision of "the State Court was not whether, if the bank- "rupt had title, it would pass to his assignees "by the operation of the bankrupt act, but "whether he had title at all. The Court de- "cided that he had not. Such a decision by a "State Court does not present a question of "which this Court can take jurisdiction upon "a writ of error."

EDWARD MURPHY, 2d, *v.* JOHN HOFMAN COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 33. Argued December 1, 2, 1908.—Decided January 4, 1909.

Where the bankruptcy court has the actual possession of property, the title to which is in dispute, that property is withdrawn from the jurisdiction of other courts, and, independently of any jurisdiction conferred by statute, the bankruptcy court, as is the case with other Federal and state courts, has ancillary jurisdiction to hear and determine all questions respecting such title; and such jurisdiction cannot be disturbed by the process of any other court. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38.

Where one who has no other connection with the property is appointed receiver his possession is that of the court and not that of an individual.

The seizure of goods in the possession of a receiver in bankruptcy, under a writ of replevin issued by a state court against the receiver, individually, *held* in this case to be an unlawful invasion of the possession of the bankruptcy court.

THE facts are stated in the opinion.

Mr. Herbert D. Bailey for plaintiff in error:

The bankrupt's actual possession of this property at the inception of the bankruptcy proceedings, and its delivery thereof to the receiver, as a part of its property, rendered it the duty of the receiver not only to take but to hold the property pending an order of the Federal court as to its disposition. *In re Schermerhorn*, 16 Am. B. R. 507; *White* v. *Schloerb*, 178 U. S. 542; *S. C.*, 4 Am. B. R. 178; *Sharpe* v. *Doyle*, 102 U. S.

686, reversing *Doyle* v. *Sharpe*, 74 N. Y. 156; *In re Rochford*, 10 Am. B. R. 608; *Whitney* v. *Wenman*, 198 U. S. 539; *S. C.*, 14 Am. B. R. 45; *In re Leeds*, 12 Am. B. R. 136; Gluck & Becker on Receivers, 389, 390; Alderson on Receivers, 329; *Stanley* v. *Schwalby*, 147 U. S. 508; *United States* v. *Lee*, 106 U. S. 196.

The Federal court having found the property in the possession of the bankrupt, who claimed it, had exclusive jurisdiction, and having by its orders disposed specifically of the property prior to October 11, 1904, on notice to the Hofman Company, its disposition was effectual and conclusive. The state court was without jurisdiction to review, modify or disturb the disposition made by the Federal court. Bankruptcy Act, § 2, (3), (5), (6), (7), (15); Bankruptcy Act, § 1, (7), (8), (9); Federal Constitution, Art. I, § 8; Federal Constitution, Art. III, § 2; *White* v. *Schloerb*, 178 U. S. 542; *Whitney* v. *Wenman*, 198 U. S. 539; *Central Nat. Bank of Boston* v. *Stevens*, 169 U. S. 432; *Peck* v. *Jenness*, 7 How. 612; *Riggs* v. *Johnson*, 6 Wall. 166; *Crescent City Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Railroad Co.* v. *Gomila*, 132 U. S. 478; *Dowell* v. *Applegate*, 152 U. S. 327; *Covell* v. *Heyman*, 111 U. S. 176; *In re Watts*, 190 U. S. 1; *Wiswall* v. *Sampson*, 14 How. 52; *Sharpe* v. *Doyle*, 102 U. S. 686; *City Bank of New Orleans, In re Christy*, 3 How. 292; *Colby* v. *Reed*, 99 U. S. 560.

Mr. John A. Barhite for defendant in error:

No Federal question is involved in this case and no officer of the United States court is interested in the decision.

It was the duty of the bankruptcy court to protect its receiver, and that court would protect its receiver from any interference in the discharge of his duties, but it appeared to that court that the defendant in error was not attempting to interfere with the receiver but was engaged in a controversy with an individual in whose welfare the bankruptcy court had no interest and over whose actions it had no control, and the order vacating the injunction was a plain direction to the re-

ceiver not to attempt to retain the show cases and that if he did attempt to retain them he did so at his own peril.

The claim of the receiver that he was helpless and was the innocent victim of his office, is controverted by the principle laid down in *Dushane* v. *Beall*, 161 U. S. 513, 515. See also *In re Geo. M. Hill Co.*, 123 Fed. Rep. 866.

The state court had jurisdiction of this action and the record shows no question which can be determined by this court.

The bankruptcy act nowhere gives exclusive jurisdiction to the United States courts to determine questions between receivers and trustees in bankruptcy and adverse claimants. The right of the United States court to administer property which comes into its possession, must rest upon the principle where it applies that property once in the possession of a court will be administered by that court and not taken from its possession by some other court. *Cook* v. *Whipple*, 55 N. Y. 150; *Peck* v. *Jenness*, 43 Am. Dec. 573, 581; *State* v. *Trustees*, 65 N. C. 714, 719; *Claflin* v. *Houseman*, 93 U. S. 130; *Eyster* v. *Gaff*, 91 U. S. 521; *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *White* v. *Schloerb*, 178 U. S. 542; *Sharpe* v. *Doyle*, 102 U. S. 686, discussed and said not to support contentions of plaintiff in error.

The trial court made no error, either in the reception or rejection of evidence, which requires the reversal of the judgment.

Upon the trial the plaintiff in error waived any claim which he might have to the property in dispute and the trial court had no other course than to direct a verdict for the plaintiff, the defendant in error.

Mr. Justice Moody delivered the opinion of the court.

This is a writ of error to review a final judgment of the Court of Appeals of the State of New York in an action of replevin. The writ was allowed to the plaintiff in error, Murphy, but denied to the party joined with him, by the Chief Judge of that court while the record was still in its possession.

and before it had been remitted to the Supreme Court, in accordance with the practice of the State. A clear understanding of the questions before this court will be aided by a relation of the facts out of which the litigation arose. Such of them as do not bear upon the Federal questions may either be omitted or stated in a very general way.

The Dodge Dry Goods Company, a corporation, had contracted with the John Hofman Company, the defendant in error, for the construction and installation in the store of the Dodge Company of a lot of show cases. Shortly after the installation of the show cases and before the contract price was paid, proceedings in bankruptcy against the Dodge Company were begun in the District Court of the United States, and, on August 18, 1903, Edward Murphy, 2d, the plaintiff in error, was appointed by that court temporary receiver of the property of the alleged bankrupt. Thereupon the Hofman Company took the position that the show cases had never been accepted by the bankrupt, and that, although they had been used for some time in the business, title to them had not passed from the vendor. Accordingly, the Hofman Company, on August 20, 1903, demanded in writing the possession and delivery of the show cases from "Edward Murphy, 2d, Receiver, etc., of Dodge Dry Goods Company." Murphy declined to deliver up the property, saying that he was in possession as receiver. The order of the District Court appointing the receiver recites the filing of the petition and affidavit, and directs the alleged bankrupt to show cause on the sixth of October, 1903, why a permanent receiver should not be appointed, and then directs that, pending the return of the order, the "alleged bankrupt be, and it hereby is, enjoined and restrained from making any transfer of any of its property and . . . all persons are enjoined and restrained from instituting and from prosecuting any and all suits and proceedings in any court against said alleged bankrupt and against any of its property. . . . that Edward Murphy,

2d, . . . be, and he hereby is, appointed temporary receiver of all the property, real and personal, and rights of action and demands due said alleged bankrupt with power to collect and receive same and continue the business with the present employés." The order further directs that the receiver shall take immediate possession of the property of the bankrupt and carry on the business. On August 21, 1903, Murphy notified the president of the Dodge Company that he had been appointed receiver, and demanded possession of the property of the alleged bankrupt. The keys of the store were given to the receiver, and he took possession of the property in it, including the show cases, and continued the business. At that time the show cases were filled with goods, and they thenceforth were used by the receiver in the conduct of the business. Nothing at the time was said specifically about them, but shortly afterward the president of the Dodge Company informed the receiver that the title to the store was in the Century Mercantile Company, another corporation, and that by the terms of the lease to the Dodge Company the fixtures, including the show cases, became the property of the landlord on the bankruptcy of the tenant. The receiver then entered into negotiations with the counsel of the Century Mercantile Company, and it was agreed that the show cases should be omitted from the receiver's inventory, and the dispute as to the title to them between the receiver and the Century Mercantile Company should be referred to the decision of the bankrupt court. The situation then was this: The receiver was in possession of the stock of goods, engaged in conducting the business, and using the show cases in the business, claiming the right to do so because they were the property of the bankrupt. The receiver had been informed that there were two outstanding conflicting claims to the title of the show cases: first, that of the John Hofman Company, who manufactured and installed them, and claimed that the title had not passed to the bankrupt but remained in the vendor; second, that of the Century Mercantile Company, who claimed that the title had

passed to the bankrupt, and that afterwards, by virtue of the terms of the lease of the store, title had been vested in it. The receiver disputed both claims, and, as we shall see hereafter, the dispute with the Century Mercantile Company was settled by the bankruptcy court in favor of the receiver. The John Hofman Company, however, failed to resort to the bankruptcy court for the adjudication of its claim, and began an action against "Edward Murphy, 2d, and Century Mercantile Company," by the service, on the sixth day of October, 1903, of a summons "to answer the complaint in this action," together with an affidavit in replevin and a requisition to replevy the show cases and a copy of an undertaking from the plaintiff accepted by the sheriff. It will be observed that Murphy was not described in the summons as receiver. On that day the sheriff went to the store, identified the show cases, and said with respect to each one, "I replevy this show case." He was requested by both defendants not to take them away. He did not move them, or lock up the store, or put a keeper in charge, and went away leaving the show cases exactly as they were when he came in. On the ninth of October, 1903, the judge of the bankruptcy court, on the petition of the receiver, enjoined all further proceedings in the action of replevin until the further order of the court; enjoined the sheriff from executing any requisition in replevin of property in the possession of the receiver, and enjoined the sheriff and all other persons from interfering in any manner with the property then in the possession of the receiver. The John Hofman Company applied for an order vacating this injunction. The application remained pending for a year, owing to the illness of the District Judge, and on October 11, 1904, the order of injunction was vacated. Three days later, on October 14, 1904, the sheriff removed the show cases from the store. In the meantime they had been sold at a trustee's sale of the property of the bankrupt.

Thereafter the defendants severally filed answers. Murphy set up in defense that at the time of the service of summons

upon him he was in possession of the property as the receiver of the bankrupt; that he remained in possession as receiver until the adjudication of bankruptcy and the appointment of himself as a trustee, and that as trustee, under the order of the bankruptcy court, he sold the property, and the sale was duly confirmed. The issue made by the pleadings was this: The plaintiff in replevin demanded the property in dispute from Murphy as an individual. Murphy, on the other hand, asserted that he had no concern with the property except in his capacity as receiver; that is to say, as an officer of the court of bankruptcy. The burden rested upon the plaintiff to show, first, that the title had not passed from it to the Dodge Company, a question purely of state cognizance; and, second, that the possession of Murphy of the show cases was not a possession as receiver in bankruptcy, a question ultimately for Federal cognizance. There was a trial before a jury and a verdict for the plaintiff, without damages, which was successively affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals. Neither court rendered an opinion.

Before going further it is well to ascertain the principles of law which are applicable to the situation. The bankrupt act of 1898, as originally enacted, did not confer jurisdiction on the District Courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of the creditors or by way of preference, unless by consent of the defendant. *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Frank* v. *Vollkommer*, 205 U. S. 521. The act, however, preserves the jurisdiction, otherwise existing by statute, of the courts of the United States, though it is limited to courts where the bankrupt himself could have prosecuted the action. *Bush* v. *Elliott*, 202 U. S. 477. But where the property in dispute is in the actual possession of the court of bankruptcy there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, Federal

or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney* v. *Wenman*, 198 U. S. 539. On the day the opinion in the *Bardes case* was announced the same justice delivered the opinion of the court in *White* v. *Schloerb*, 178 U. S. 542, a case in which the facts were essentially those of the case at bar. Certain persons, copartners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the District Court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: "The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States they

could not be taken out of that custody upon any process from a state court." The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see *Skilton* v. *Codington*, 185 N. Y. 80, 85, 86, and *Frank* v. *Vollkommer*, 205 U. S. 521, which by implication approve the same principle.

We think this principle was lost sight of in the trial of the case before us. We must assume in favor of the plaintiff in replevin that the replevin was completed on the sixth of October, 1903, when the sheriff identified the goods and, at the request of the defendant, left them in place in the store and delivered to the defendants the undertaking, which apparently was accepted by them as good. If, at this time, the show cases were in the possession of the court of bankruptcy; that is to say, were in the possession of Murphy as the receiver appointed by the court of bankruptcy, then, according to principle and in obedience to the express authority of *White* v. *Schloerb*, *supra*, the action of replevin in the state court cannot be maintained. Upon the undisputed facts, as they appeared at the trial, it is impossible to suppose that Murphy had any possession except as receiver. He had no personal interest in the affairs of the bankrupt, and no relation to its property except that created by his appointment to that office. There is but a single circumstance which points the other way, and to that circumstance reference presently will be made. The demand of the plaintiff in replevin for the delivery of the goods was made upon "Edward Murphy, 2d, Receiver," etc. The plaintiff introduced no evidence tending to show that Murphy had any possession except as receiver. When the evidence for the defendant came to be introduced the nature of Murphy's possession was more fully explained. James E. Dodge, presi-

dent of the Dodge Dry Goods Company, and manager of its business, testified that on the twenty-first day of August, 1903, Murphy called at the store and notified him of his (Murphy's) appointment as receiver, and demanded the possession of the assets of the Dodge Dry Goods Company. He says: "The property that I gave him possession of at that time was merchandise and fixtures in the store, also supplies and book accounts; all the property of the Dodge Dry Goods Company. And all the property that was in possession of the Dodge Dry Goods Company. And among the things I turned over to him were included these show cases that are the subject of this action. There was no exception made of the show cases. . . . I handed him the keys of the store, and told him its contents were the property of the Dodge Dry Goods Company. And these show cases were part of the contents at that time. There was no special mention made of the show cases at that time." Murphy testified that at this interview Dodge turned over to him the keys of the building and showed him the property of the Dodge Dry Goods Company, stock, dry goods and merchandise, complete store equipment, consisting of show cases, counters, etc. The show cases were then on the ground floor, and the goods were in them when they were turned over to him as receiver, and he continued to use the show cases in the performance of his duty as receiver, and claimed them as the property of the bankrupt. The defendant offered in evidence the order of the court of bankruptcy, made August 18, 1903, appointing him as receiver, and offered to show that it was exhibited to the sheriff at the time of the replevin. This order, which hereinbefore has been fully set forth, appointed Murphy "temporary receiver of all the property, real and personal," of the bankrupt, directed him to take immediate possession of all the property and to carry on the business. This evidence was excluded, and we think the exclusion was clearly erroneous.

The plaintiff in replevin lays much stress upon one circumstance, as tending to show that Murphy was not in possession

of the property as receiver, but as bailee of the Century Mercantile Company, and to that circumstance more particular attention must now be given. Murphy testified upon cross-examination that he did not include the show cases in the schedule filed by him as receiver, but this testimony must be considered in connection with the explanation which accompanied it. Dodge originally had owned the store and had leased it to the Dodge Dry Goods Company, of which he was president. The lease contained a provision that upon the bankruptcy of the dry goods company the fixtures, including the show cases, should become the property of the owner of the store. The store subsequently was conveyed to the Century Mercantile Company, of which Dodge was also president. After the stock in trade, including the show cases, had been turned over to Murphy as receiver, Dodge, acting in behalf of the Century Mercantile Company, made a demand upon him for the fixtures and show cases, basing his demand upon the provision in the lease. Just how long after the delivery of possession to Murphy this demand was made is not clear, but it is enough to say that the demand was subsequent to the delivery. Murphy declined to yield to this demand, and agreed with counsel for the Century Mercantile Company that the dispute should be decided by the court of bankruptcy. The defendant offered to show that subsequently the court decreed that the provision in the lease was void, and that the fixtures, including the show cases, were the property of the bankrupt. This evidence was excluded, and, we think, erroneously. It tended, in connection with other evidence, to show the nature of Murphy's possession, and that he was insisting upon his right as receiver, and had not accepted the goods personally as bailee of the Century Mercantile Company. Pending the settlement of the dispute, and for no other reason than that the dispute existed, the show cases were omitted from the inventory. The facts which have been recited deprived this omission of all significance as showing that Murphy had any other possession than as receiver.

At the trial Murphy relied upon his possession as receiver to defeat the action. His answer had set up that defense, and in many ways, which it would be unprofitable to set forth in detail, he sought to avail himself of it. It is enough to say that at the conclusion of the evidence the court was requested to direct a verdict for the defendant Murphy, upon the grounds, among others, "That the plaintiff has not shown itself entitled to possession at the time of the commencement of the action, but has shown that the then present right of possession was in the United States Court," and "the plaintiff has not shown that the property was in the possession of the defendant Murphy, but that it was in the possession of the United States Court," and "this Court had no jurisdiction over the subject-matter of this action when it was commenced." The judge presiding at the trial refused, under exception, to give any of these instructions, and submitted the case to the jury in a charge which made no reference to the rights of Murphy as a receiver, or to the possession of the property by him as an officer of the court of bankruptcy, other than to say "as the case then stood, Mr. Murphy was claiming this property as the receiver of the Dodge Company." The judge instructed the jury that if they should find that the show cases furnished by the Hofman Company had not been accepted by the Dodge Company, then the title failed to pass and the verdict must be for the plaintiff. Thus the whole Federal question, so far as it was a question of fact, was withdrawn from the consideration of the jury. Subsequently, after a colloquy with the defendant's counsel, in which he stated that Murphy made no claim as an individual to the property in dispute, and did not ask its return to him, the judge, against the objection and under the exception of Murphy, peremptorily directed a verdict for the plaintiff. We do not set forth that colloquy in full, although it is much relied upon by the defendant in error. While the statements of counsel were confused, we think that what was said by him amounted to nothing more than an assertion that Murphy had had no relation to the property,

except as receiver, and that his possession as receiver entitled him to claim for the property thus possessed and controlled, an immunity from the process of the state court.

But one other question needs any attention. It has been seen that the injunction against proceedings in the state court in this case, granted by the judge of the bankruptcy court on October 9, 1903, was vacated about a year later. The reason for this does not appear in the record. The Hofman Company, however, relies upon this vacation of the order of injunction as an abandonment by the court of bankruptcy of its possession of the property and a turning over of it to be dealt with by the state court. We cannot give to the order vacating the injunction this meaning. If it has any tendency whatever to show an abandonment of possession, it is fully explained by much evidence of a dealing with the property by the bankruptcy court, some of which was excluded at the trial.

On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be justified by the assertion, entirely unsupported by the evidence, that Murphy was then holding the goods, not as an officer of the court, but as an individual.

For this reason the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.